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BY THE AMERICAN BAR ASSOCIATION

CONTENTS

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Statement of the Ownership, Management, Circulation, Etc., required by the Act of Congress of August 24, 1912,

of THE AMERICAN BAR ASSOCIATION JOURNAL, published quarterly at Baltimore, Maryland, for October 1st, 1919.

STATE OF MARYLAND, BALTIMORE CITY, *SS.*

Before me, a Notary Public in and for the State and City aforesaid, personally appeared George Whitelock, who, having been duly sworn according to law, deposes and says that he is the managing editor of the American Bar Association Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, printed on the reverse of this form, to wit:

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THE AMERICAN BAR ASSOCIATION

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Sworn to and subscribed before me this 15th day of September, 1919.

[SEAL] NELLIE A. DAVIDSON, *Notary Public.*
(My commission expires May 4th, 1920.)

Subscription price to individuals, not members of the Association nor of its Bureau of Comparative Law, $3 a year. *To those who are members of the Association (and so of the Bureau), the price is $1.50, and is included in their annual dues.*

The Advertising Department is in charge of M. Curlander, Law Publisher, Baltimore, Md., to whom all communications as to advertising space and rates should be addressed.

Letters as to other business relating to the JOURNAL should be addressed to the office of publication; those as to the Bureau of Comparative Law to Robert P. Shick, 1107 Liberty Building, Philadelphia, Pa.; and those as to the general plan and literary contents of the JOURNAL to the Chairman of the Committee on Publications, Carroll T. Bond, Court House, Baltimore, Md.

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The American Bar Association Journal

VOL. V OCTOBER, 1919 No. 4

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IV.
ANNOUNCEMENTS.

MEETING OF EXECUTIVE COMMITTEE.

The Executive Committee will hold its mid-winter meeting on January 8, 1920, at 10 A. M., at the Bellevue-Stratford Hotel, Philadelphia, Pa.

Chairmen of committees are reminded of the resolution of the Executive Committee passed January, 1917, as follows, viz.:

"*Resolved,* That before action by the Executive Committee on the regular appropriations at the winter meeting there shall be required a statement in behalf of each committee, section or other organization desiring an appropriation, showing the unexpended balances of former appropriations, all unsatisfied obligations, and the specific purposes for which the appropriation is desired; that when an increase of appropriation over that of the last preceding year is asked there shall be required a statement of the specific expenditures to be made in the ensuing year in addition to or in excess of those of the preceding year, and of the reasons for such addition or increase."

UNIFORM ACTS CONCERNING CONDITIONAL SALES AND FRAUDULENT CONVEYANCES.

Upon the report of the Committee on Uniform State Laws, the Association adopted, at the meeting in Boston, a resolution approving the **Conditional Sales Act** and the **Fraudulent Conveyances Act** prepared by the National Conference of Commissioners on Uniform State Laws, and recommending them for adoption by the various states.

The Vice-President and Member of the General Council from each state will please note the above recommendation by the Association, and will endeavor, in accordance with By-Law X of the Constitution, to procure the enactment by their legislature of the acts approved by the Association. A copy of each of these acts will be found in the July JOURNAL, pages 482-496; additional copies may be had on application to the Secretary.

BINDING THE JOURNAL.

The Lord Baltimore Press is prepared to bind THE AMERICAN BAR ASSOCIATION JOURNAL in uniform binding at a cost of $1.50 per volume. In color and style the binding will be similar to that of the Annual Reports. Members desiring to have the four numbers of the 1919 JOURNAL bound in one volume, will please communicate directly with The Lord Baltimore Press, Greenmount Avenue and Oliver Street, Baltimore, Md.

MEETINGS OF STATE BAR ASSOCIATIONS.

OREGON BAR ASSOCIATION, November 18, 1919, Portland.

THE RHODE ISLAND BAR ASSOCIATION, December 1, 1919, Providence.

VERMONT BAR ASSOCIATION, January 7, 8, 1920, Montpelier.

BAR ASSOCIATION OF THE STATE OF KANSAS, January 27, 28, 1920, Topeka.

NEW YORK STATE BAR ASSOCIATION, January, 1920.

IOWA STATE BAR ASSOCIATION, June 24-25, 1920, Cedar Rapids.

STATE BAR ASSOCIATION OF CONNECTICUT, latter part of January, 1920, Hartford.

BOOKS RECEIVED.

Acknowledgment is made of the receipt by the Secretary of the following books:

Proceedings of the 21st Annual Meeting of the Bar Association of Arkansas.

Minutes of the New Mexico Bar Association, 32d Annual Session, 1918.

Proceedings of the Minnesota State Bar Association, 18th Annual Session, 1918.

Annual Report of State Bar Association of Connecticut, 1919.

Report of West Virginia Bar Association, Vol. 34, 1918.

American Marriage Laws in their Social Aspects (Russell Sage Foundation).

Philippine Law Review, Annual Meeting Number, 1919.

The Shantung Question (Chinese National Welfare Society in America).

The Rice Institute Pamphlet, April, 1917.

The Lawyers' List, 1919.

V.

CONSTITUTION AND BY-LAWS
OF
THE AMERICAN BAR ASSOCIATION

Adopted September 5, 1919

CONSTITUTION.

ARTICLE I.

NAME AND OBJECT.

This Association shall be known as "THE AMERICAN BAR ASSOCIATION." Its object shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation and of judicial decision throughout the Nation, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar.

ARTICLE II.

QUALIFICATIONS FOR MEMBERSHIP.

Any person, on nomination in accordance with the provisions of Article III, shall be eligible to membership in this Association who shall be, and shall have been for three years next preceding nomination, a member in good standing of the Bar of any state.

ARTICLE III.

ELECTION OF MEMBERS.

(a) Nominations for membership shall be made by a majority of the Local Council of the state to the Bar of which the persons nominated belong, and must be transmitted in writing to the Chairman of the General Council, and approved by the Council on vote by ballot, except as provided in sub-division (d) hereof.

(b) The General Council may also nominate members from states having no Local Council, and at the annual meeting of the Association may nominate members from any state of which

a majority of the members of the Local Council are not then in attendance; but no such nomination shall be made or considered by the General Council, unless supported by a statement in writing of at least three members of the Association from the same state with the person nominated, or in the absence of three such members, then by three members from a neighboring state or states, to the effect that the person nominated has the qualifications required by the Constitution and desires to become a member of the Association, and that his admission as a member is recommended by the signers of the statement.

(c) All nominations thus made shall be reported by the Council to the Association for its action. The vote shall be taken *viva voce,* unless any member demand a vote by ballot upon any name thus reported, in which case the Association shall vote thereon by ballot. Five negative votes shall prevent an election.

(d) During the period between annual meetings, members may be elected by the Executive Committee upon the written nomination of a majority of the Local Council of any state. One negative vote in the Executive Committee shall prevent an election.

(e) Persons of distinction who are members of the Bar of another country but not members of the Bar of any state of the United States, may, without formal nomination or certification, be elected by the Executive Committee to be honorary members of the Association. Honorary members shall be entitled to the privileges of the floor during meetings, but shall not be entitled to vote, and they shall pay no dues.

Article IV.

Officers, Committees and Sections.

The following officers shall be elected at each annual meeting for the year ensuing:

A President;

A Vice-President from each state;

A Secretary;

A Treasurer;

A General Council, consisting of one member from each state.

The same person shall not be elected President in two successive years.

The General Council shall be a Committee on Nominations for office and shall elect its Chairman annually, but the same person shall not be elected Chairman more than three successive years.

There shall be an Executive Committee, which shall consist of the President, the last retiring President, the Chairman of the General Council, the Secretary and the Treasurer, all of whom shall be members ex-officio, together with eight other members to be elected by the Association upon nomination by the General Council, but no member shall be elected more than three years in succession. The President, and in his absence the former President, shall be Chairman of the committee.

The Executive Committee shall have full power and authority, in the interval between meetings of the Association, to do all acts and perform all functions which the Association itself might do or perform, except that it shall have no power to amend the Constitution or By-Laws.

There shall be one or more Assistant Secretaries, who shall be elected by the Executive Committee, and shall hold office at the pleasure of that committee.

The following committees shall be appointed annually by the President for the year ensuing, each to consist of five members, unless otherwise specifically indicated herein:

On Commerce, Trade and Commercial Law;
On International Law;
On Insurance Law;
On Jurisprudence and Law Reform, to consist of 15 members;
On Professional Ethics and Grievances;
On Admiralty and Maritime Law;
On Publicity;
On Publications;
On Noteworthy Changes in Statute Law;
On Membership, to consist of such number as the President may appoint; and
On Memorials, of which the Secretary shall be the Chairman.

The Chairman of each Section of the Association, and the President of the National Conference of Commissioners on Uniform

State Laws, shall each be deemed a committee of one, and each shall report the work of his Section or Conference and present its recommendations for action by the Association.

A majority of the members of any committee, including the General Council, present at any meeting shall constitute a quorum.

The Vice-President for each state and four other members from such state to be annually elected, shall constitute a Local Council for such state. The Vice-President shall be ex-officio Chairman thereof. It shall be the duty of the Vice-President from each state to report the deaths of members within the same to the Committee on Memorials.

The members of the General Council and the members of the Local Council in each state shall constitute a committee for their state to further the interests and opinions of the American Bar Association in such manner and in such ways as shall be suggested by the Executive Committee.

There shall be the following Sections of the Association:

Section of Legal Education and Admissions to the Bar;

Section of Patent, Trade-Mark and Copyright Law;

Judicial Section;

Section of Comparative Law;

Section of Public Utility Law;

Section of Criminal Law and Criminology; and such other Sections as may from time to time be authorized by the Association upon the recommendation of the Executive Committee thereof.

Each Section shall have a Chairman, Vice-Chairman, Secretary, Treasurer, and a Council which shall consist of eight members elected by the Section. Each Section shall have power to adopt By-Laws for the regulation of its functions, not inconsistent with the Constitution and By-Laws of the Association, and subject to the approval of the Executive Committee of the Association. The Council of each Section shall be known and designated as "The Council of the American Bar Association" on the particular subject which characterizes the work of the Section, as, for example, the Council of the Section of Legal Education and Admissions to the Bar shall be known as "The Council of the American Bar Association on Legal Education and Admissions to the Bar." Qualifications for membership in any

Section may be determined by the Section itself and shall be defined in its own By-Laws, provided that action taken by a Section must be approved by the Association before the same shall become effective.

Article V.

BY-LAWS.

By-laws may be adopted, amended, or rescinded at any meeting of the Association by a vote of three-fourths of the members present at any session of such annual meeting, provided there be not less than two hundred members present at such annual meeting, and provided further that notice shall have been given by the Secretary to the members of the Association either by mail or by publication in the JOURNAL at least thirty days before the meeting at which action is taken.

Article VI.

DUES.

Each member shall pay $6.00 to the Treasurer annually, which sum shall include dues and the cost of subscription to the AMERICAN BAR ASSOCIATION JOURNAL, which to members is $1.50 per year. All other publications of the Association shall be free of charge to the members. No person shall be in good standing or qualified to exercise any privilege of membership who is in default. The Executive Committee, in its discretion, may remit the dues of any member under special circumstances.

Article VII.

PRESIDENT'S ADDRESS.

At each annual meeting of the Association, the President shall deliver an address upon such topics as he may select with the approval of the Executive Committee.

Article VIII.

ANNUAL MEETINGS.

The Association shall meet annually at such time and place as the Executive Committee may select, and those present at any session of any meeting shall constitute a quorum, except as provided in Articles V and X.

The American flag shall be displayed at all meetings of the Association.

Article IX.

REFERENDUM.

The Executive Committee may submit from time to time by referendum to the individual members of the Association questions affecting the substance or the administration of the law which in the opinion of the Committee are of immediate practical importance to the whole country.

Article X.

AMENDMENTS.

This Constitution may be altered or amended only by a vote of three-fourths of the members present at any session of an annual meeting, but no such change shall be made unless at least two hundred members shall be present, nor unless notice of the proposed alteration or amendment shall have been given by the Secretary to the members of the Association either by mail or by publication in the Journal at least thirty days before the meeting at which the amendment is offered.

Article XI.

CONSTRUCTION.

The word "state," whenever used in this Constitution, shall be deemed to comprise state, territory, the District of Columbia or any insular or other possession of the United States and places over which the United States exercises extra-territorial jurisdiction.

BY-LAWS.

MEETING OF THE ASSOCIATION.

I. The program and order of exercises at the annual meeting of the Association shall be those prescribed by the Executive Committee and notified to the members at least thirty days before the meeting.

REPORTS OF COMMITTEES.

II. Where the report of a committee has been printed, it shall not be read at a meeting of the Association, but if the report recommends action by the Association, the recommendations shall be set forth at the beginning of the report, and the chairman of the committee may state briefly to the meeting their substance and the reasons for them.

RESOLUTIONS—PROCEDURE.

III. No person shall speak more than ten minutes at a time or more than twice on one subject, except as indicated on the formal program prepared by the Executive Committee.

Every resolution shall be in writing and unless of a formal character or presented by a committee, shall be referred by the Chair on presentation, without debate, to an appropriate committee for consideration and report. No resolution which is neither favorably reported by a committee nor adopted by the Association, shall be published in the proceedings of the meetings.

No legislation shall be recommended or approved by the Association unless there has been a report of a committee thereon, and unless such legislation be approved by a two-thirds vote of the members of the Association present.

No resolution complimentary to an officer or member for any service performed, paper read or address delivered shall be considered by the Association.

NON-MEMBERS: PRIVILEGES OF FLOOR.

IV. Members of the Bar of any foreign country or of any state who are not members of the Association may be admitted to the privileges of the floor at any meeting of the Association.

BOOKS AND PAPERS OF THE ASSOCIATION.

V. All papers, addresses and reports read before the Association or submitted to it, shall be lodged with the Secretary and become the property of the Association, and shall not be published unless by the express direction of the Executive Committee. Committee reports which have been printed in full in the JOURNAL shall not be printed again in the annual volume of the Association, but there may be printed therein a brief epitome or condensed summary of such a report which may be prepared by the chairman of the committee making the report.

Extra copies, not exceeding one hundred in number, of any report, address or paper read before the Association may be printed by the direction of the Executive Committee for the use of the author.

The Executive Committee shall arrange through the Smithsonian Institution, or otherwise, a system of exchanges by which the Transactions can be exchanged annually for those of Associations in foreign countries interested in jurisprudence or governmental affairs; and the Secretary shall exchange the Transactions for those of the State and Local Bar Associations. All books thus acquired shall be bound and, provided the New York City Bar Association consents thereto, shall be deposited in the charge of that Association, subject to the call of this Association, if it ever desires to withdraw or consult them.

The Secretary shall send one copy of the Annual Report to the President of the United States, to the Chief Justice of the United States, to each of the Associate Justices of the Supreme Court of the United States, to the Library of the State Department, and of the Department of Justice thereof, to the Governor, to the Chief Judge or the Chief Justice of the court of last resort of each state, to the State Librarian thereof, to all public law libraries, to college libraries, to other principal libraries in the United States, and to such other persons or bodies as the Executive Committee may direct.

OFFICERS AND COMMITTEES.

VI. The terms of office of all officers elected at any annual meeting shall commence at the adjournment of such meeting, except the members of the General Council, whose term of office

shall commence immediately upon their election. Vacancies in any office, except the General Council, occurring between the annual meetings shall be filled by the Executive Committee; and such interim vacancies in the General Council shall be filled by the Local Council of the state.

VII. The President shall appoint all committees, including special committees, and shall announce the appointments to the Secretary, who shall give notice to the persons appointed.

There shall be appointed annually by the President a committee to be known as the Reception Committee, whose duty it shall be to attend immediately before and at the opening of the first day's session of the meeting to receive members and delegates and introduce them to each other.

The Committee on Professional Ethics and Grievances shall communicate to the Association such information as it may collect concerning the activities of State and Local Bar Associations in respect to the ethics of the profession and grievances against members of the Bar, and it may from time to time make recommendations on the subject to the Association.

VIII. The Treasurer's report shall be examined and audited annually before its presentation to the Association, by a licensed public accountant designated by the President.

IX. The General Council and all standing committees shall meet at the time and place of the annual meeting at such hours as their respective chairmen shall appoint.

The Secretary of the Association shall be the Secretary of the General Council.

X. Special meetings of any committee shall be held at such times and places as the Chairman thereof may appoint. Reasonable notice shall be mailed by him to each member.

The traveling and other necessary expenses incurred by any committee, standing or special, for meetings of such committee or otherwise, during the interval between the annual meetings of the Association, shall be paid by the Treasurer out of such appropriation as the Executive Committee shall have made on application in each case in advance of its expenditure. Such application shall be made in writing by the chairman of each committee thirty days before the mid-winter meeting of the Executive Committee and upon a specific budget.

All committees may have their reports printed by the Secretary, upon order duly made by the Executive Committee, before the annual meeting of the Association; and any such report containing any recommendation for action by the Association, shall be printed, together with a draft of a bill embodying the views of the Committee, whenever legislation shall be proposed. Such reports shall be distributed by mail by the Secretary to all members of the Association at least thirty days before the annual meeting at which such report is proposed to be submitted.

It shall be the duty of each Vice-President and member of the General Council to endeavor to procure the enactment by the legislature of his state of every law recommended by the Association, and the Secretary shall furnish them with copies of every recommendation and of every bill recommended and a copy of this by-law; and whenever the Association shall by resolution recommend the enactment of any law, the Secretary shall furnish as soon as possible, a copy of the resolution to the President of each State Bar Association, with the request that such Association cooperate with the local vice-president and member of the General Council of this Association and the National Conference of Commissioners on Uniform State Laws of such state in having a bill introduced in the legislature of its state in conformity with the recommendation of this Association, and use proper means to procure the enactment of the same into law. In every state where there is no State Bar Association, a copy of such resolution, with a similar request, shall be sent to the President of the Bar Association of the principal cities in the state; and in every instance where the form of bill has been recommended, a copy thereof shall also be sent with the resolution.

ANNUAL DUES.

XI. The annual dues shall be payable at the annual meeting in advance. If any member neglects to pay his dues on or before June 1st following the annual meeting it shall be the duty of the Treasurer to serve upon him, by mail, a copy of this by-law and notice that unless the dues are paid within one month thereafter, the default will be reported to the Executive Committee, which may, without further notice, cause his name to be stricken from the roll for non-payment of dues, and his membership and all rights in respect thereto will thereupon cease.

SECTIONS.—GENERAL REGULATIONS.

XII. Each Section shall meet at least once a year in connection with the meeting of the Association, but not during such hours as the Association is in session.

2. The proceedings of any or all of the Sections may be published from time to time, in the discretion of the Executive Committee.

3. Any member of the Association may enroll himself as a member of any Section provided he meets the requirements in other respects of the by-laws of such Section.

4. Matters arising in the meetings of the Association which relate to a subject with which a Section is primarily concerned, may be referred to such Section.

5. Appropriations may be made from time to time by the Executive Committee of the Association to any Section and to the National Conference of Commissioners on Uniform State Laws; but the financial liability of the Association to the Sections or any of them or to the National Conference of Commissioners on Uniform State Laws, shall be limited to such appropriations as may be made for them and shall cease upon payment to the treasurers of the Sections or of the Conference of the amounts so appropriated.

6. The chairman or other officer of each Section shall present to the Association at its annual meeting a report in detail of its work and finances up to the preceding June 1st.

VI.

ADDRESS

OF

CHIEF JUSTICE EDWARD D. WHITE

AT THE

ANNUAL DINNER OF THE ASSOCIATION,

SEPTEMBER 5, 1919.

An elevated nature throws upon the characters which it estimates the light of its own unselfish generosity. I know of no better illustration of this than that afforded by the words of extreme praise a moment ago uttered by my esteemed friend the distinguished Chief Justice of Massachusetts. By the light of this truth you must scrutinize the white lies which out of the fullness of his heart he has spoken to you. I hope you observed that as soon as I appreciated what was coming, at least as a tribute due to the virtue of modesty, I turned my back upon the Chief Justice in order not to be responsible for things going on behind me.

Mr. President: It is a privilege to be with you tonight a participant in this annual banquet, but it is a pleasure not without its pang, for as I look upon those who are here assembled, ah, me! I cannot but be conscious of how many who participated in the last annual meeting and banquet which I attended, and to whom I was bound by ties of respect and affection, are not visible tonight because they have passed from time to eternity. The pulling at the heart strings which the consciousness of this fact brings is, however, assuaged by the conviction that they have gone to their reward and that although they may not be visible in the material sense they are not absent in the true sense, since the duty which they owed to their fellow-countrymen as lawyers has devolved upon and is being carried out by their brethren who are physically here.

The thought is aptly illustrated by the maxim of the ancient French law, "*Le mort saisit le vif,*" which, as applied to our profession and to its public responsibilities, teaches the eternity of duty and the ever-living endurance of the obligations of our

profession to preserve human liberty and perpetuate free and representative government. I say, Mr. President, our profession, because although it happens that the line of my duty for many years has been judicial, that fact instead of weakening has strengthened the ties which make me one of the profession and has caused me to feel more and more every day of my life the indispensable unity which makes the Bench and Bar one and indivisible in the accomplishment of the great responsibilities which rest upon them. What are the public duties which rest upon the members of our profession and how may those duties, in a general sense, best be performed, are the subjects to which I intend to refer in the most cursory way.

Undoubtedly our forefathers sought by the government which they created to save us from the misery and anguish which had, as a necessary consequence, ever resulted from the despotism of the one over the many or the tyranny of the many over the few. To this end their purpose was to make human freedom perpetual by guaranteeing the great rights of life, liberty and property to each and every individual and thus secure those precious blessings to all under the free and representative government which they established.

To accomplish these objects the constitutional structure which they erected had a duplex character, national on the one hand and state on the other, each designed to move in its respective sphere of action without interfering with the powers of the other, both being restrained by the fundamental guaranties or prohibitions which were ordained to prevent the abuse of the powers which were recognized or granted and to confine their operation in their appropriate area.

Simple and resourceful as were the institutions thus provided, it is apparent that standing alone they are wholly inefficacious because they were without ultimate sanction, that is, without any regulating power having authority to restrain wrongful or mistaken exertions of the powers given, and thereby to prevent the crash and confusion which would necessarily be the consequence of mistake or error in their exercise.

It is, I submit, further not to be doubted that the Fathers, contemplating this situation, determined to provide a remedy for it. Seeking to accomplish that result and bringing into mind

the traditions of our race as to the benefactions which had come to it from the wisdom, the courage, the fidelity, the integrity and the restraint by which the law of the land had been administered through lawyers and courts, they made that law as construed and applied by the courts in justiciable controversies the final sanction by which the powers conferred were in the ultimate sense to be tested when called into play. How simple and yet how remarkable was the conclusion thus adopted! a conclusion which today challenges the admiration of the world and stands virtually as the abiding hope for the protection of individual right and the perpetuation of free government.

Who can say that the Fathers were mistaken in the fact of this mighty nation which has developed under the institutions which they thus created? Who can say that the transcendent result of their work thus demonstrated was not in a vast measure secured by the sanction of judicial power which the Fathers adopted when what may be truly called that remarkable and comprehensive code of international law is taken into view by which, as the result of justiciable controversies culminating in judicial decisions, the principles of the Constitution have been defined to the end that the governments, both national and state, have been able to discharge their great duties each secured from unwarrantable interference the one with the other?

While it is true that the causes which antedated the Constitution and which served to provoke the awful struggle of the Civil War proved uncontrollable by the legal sanctions which the Constitution contemplated, the potentiality which those sanctions embodied and their wonderful efficiency and power stand demonstrated, not only by what I have previously said, but by the power which their application produced on the results of that war and the complete obliteration which their exercise served to bring about of all the evil consequences to the state and nation which otherwise would have arisen and in all human probability have detrimentally operated upon our national life at least for a long period of time. It is not only the marvel of the result thus stated which challenges our attention but the simplicity of the means by which it was accomplished, that is, the announcements of one judicial decision after another concerning individual rights by which the difference between peace and war was

demarked and the country was led again into the home of the Fathers sheltered by the rights and limitations which the Constitution provided. Indeed, so completely was this accomplished that, not only were the wounds occasioned by the Civil War fully healed, but the minds of all were turned away from the bitterness and conflicts of the past to the great and perfect rights which were enjoyed.

How better can the complete bringing about of these conditions be shown than by considering those mighty forces which on land and sea, for the protection of the individual right of the American citizens and for the punishment of foul and dastardly wrongs committed upon them and for the protection and extension of democracy through the instrumentality of representative and free government, have by their valor and their heroism just brought the war to so triumphant a conclusion? Yes, how more particularly can the oblivion of every rancor dependent on the Civil War be demonstrated than by observing that on every field from the plains of Flanders to the far-off hills, in those plains, in the valley of the Meuse, in the Champagne, in the Argonne, with a valor and heroism never exceeded, the sons of New England and of all the Atlantic Seaboard states, those stretching from there to the Pacific and of all the Southern states, in short, of every state, stood shoulder to shoulder in line of battle, and that those who so gloriously gave up their lives lie side by side where they fell.

Why should it, when these things are considered, be farfetched to say that if we had power this night to raise to life the lines of conflicting forces where they fell along the fateful heights of Gettysburg or anywhere else in the combats of the Civil War they would not be enemies one to the other but brethren rejoicing in the glory and honor and strength of the nation which the Fathers created.

Yes, my brethren, it must be recognized from what I have said that the American lawyer, from the public point of view, is especially dedicated to the preservation of human liberty and upon him and the faithful discharge of his duties rests the hope of all the ages for its perpetuation. Ah! let us recognize this great truth and let us resolve the more and more as we go about the daily affairs of our lives to carry it in our minds and hearts in

order more fully to meet the great responsibilities which rest upon us. Let its consciousness admonish us to put aside the fallacious suggestion that the Constitution has outlived its usefulness, that the country has outgrown the restraints which the Constitution creates, that as individual right is inimical to progress and liberty and a free government, such right should be destroyed, to be replaced by some strange combination of the many to the obliteration of all individual freedom.

I know that at this particular juncture the dislocations produced by the great war through which we have passed, the cost of high living, the diminution of production and other interferences with the law of supply and demand necessarily consequent on the war have brought about an ephemeral condition as to the high cost of living which affords a fertile field for all sorts of chimerical suggestions which substantially assume the impotency of free government and the necessity for overthrowing it. Yes, I know further it is true to say that if the bountiful crop of demagoguery and of absolutely frivolous suggestions which this situation has stimulated be too seriously considered, fear for our free institutions may be engendered. But such fear can only be momentary if the great body of American freemen be brought into account. How can it be otherwise when we recall the millions of our fellow citizens who love their country, who appreciate the blessings which the individual liberty and representative government give, and are fixed in their purpose to perpetuate them? How can it be possible to feel the slightest doubt on this subject if additionally we bring before our minds, by way of illustration, some of the subjects which are embraced in the general considerations I have just referred to, that is, of the homes of all our land, of the churches in which the prayers of such a multitude of our people go up for blessings on our country, and of the great body of men who by land and sea have so recently made it glorious by their splendid courage and self-sacrificing discharge of duty.

While these considerations of the present situation afford instant certainty, I must confess that sometimes as my thoughts turn to the future and the vast probable increase in our population, to the infinite opportunity which liberty affords to those who misguidedly or with intentional wrong preach the

destruction of our institutions under the guise of preserving freedom, a great dread comes to me that possibly some day in the future the forces of evil, of anarchy and of wrong may gather such momentum as to enable them to overthrow directly or indirectly the constitutional institutions which the Fathers gave us and thus deprive us of those blessings which have come from their possession. But this pessimism is also only momentary for, lo! as I strain my vision to the dawn of the generations which are to come my heart rises with exaltation and gratitude because it is given to me to see an advancing force full of love for individual liberty and free government and fixed in the purpose to perpetuate them. Ah! as I look at its noble array, confidence in the future becomes assured and I cannot but exclaim: All hail, the American lawyer of the generations which are to follow! Come! come! in your allotted time so that individual liberty may endure, representative government be perpetuated and the only safe and peaceful highway for the advance of democracy in its true sense be made certain.

VII.

ADDRESSES DELIVERED AT THE BOSTON MEETING.

ADDRESS OF THE PRESIDENT.

BY

GEORGE T. PAGE,

OF ILLINOIS.

GOVERNMENT.

I.

> "That the nation shall, under God, have a new birth of freedom. That government of the people, by the people and for the people shall not perish from the earth."

Until the year of Grace, 1914, I had always supposed that government was the product of civilization, instituted for the regulation of the social relations of human beings and in recognition of the fact that the remnant of savagery in man, even though he is often in an advanced civilized state, must be controlled; but since I have witnessed the war that has shown four years of wholesale rapine and murder, so inexpressibly fiendish, cruel and brutal that mere savage, untrained minds could never have planned nor executed such atrocities, I have almost made up my mind that some governments, instead of being the product of civilization, were established to be mere instruments of men who have used the arts, sciences and training of civilization to work out their own cruel and inhuman purposes of killing everybody else in the world who would not submit to be ruled by them.

Supremacy in the world, by the killing of those who had the temerity to resist and the enslavement of those who submitted, seems to have been the ultimate aim of the Prussian autocracy.

Happily, that menace is no longer imminent, but the purchase price paid for its removal—or postponement—(which has not yet been determined) has been so stupendous as to be almost unbelievable, even with the evidences yet baldly before our eyes.

Remembering the billions of destroyed or ruined property that represented the surplus from the toil and sweat of men of many nations who hated war but loved peace; remembering the ruined fields of France and Belgium; remembering the millions of dead men and ruined women, the very flower of the best men and women of the Twentieth century in almost every nation; and remembering the additional millions who have been crippled so that they must live out their lives in pain and suffering and be a burden upon other people, and remembering that the whole future is overhung and burdened with a war debt, and other incalculable consequences, that will far outlast the lives of most of us; and then remembering that Prussian autocracy, in the face of twenty centuries of Christian civilization, was able to bring all this about under its determination to rivet its rule of blood and iron upon the world—I stand confused and in doubt, wondering if there remains faith enough to believe that the strong men of the world will surrender enough of their selfish desire for money and power to permit the successful establishment of a government "dedicated under God to have a new freedom, a government of the people, by the people and for the people."

The man who does not stand with bowed head, awed by the awful past, the uncertain and confusing present and the ominous future, has neither feeling, thoughtfulness nor prudence.

In spite of it all, however, we must not fear, doubt nor falter, but must take up intelligently and with courage and determination the seemingly impossible tasks that are all about us and reconstruct and readjust the broken and disturbed condition of things, produced—on the one hand—by war, and on the other hand, by what seems to me to be our utter disregard of some of the fundamentals necessary to establish and perpetuate a democratic form of government.

In a government like ours, where the ultimate power and authority rest with the people, every question between a man and society presents, or is likely to present, a problem to be dealt with by the government and particularly is this true where we find great proneness not only in the 48 legislatures, but also in the Congress itself, to make almost every matter imaginable the subject of some legislative prohibition or regulation.

As all human beings have their limitations, so any government—set up by human beings—must, inevitably bear evidences

of the limitations and the imperfections under which human beings live their lives.

Very strong evidence of the imperfections and inconsistencies that creep into the most serious works of men and obtrude themselves upon their most solemn undertakings, may be found in the fact that on July 4, 1776, 13 colonies solemnly wrote into their Declaration of Independence, the clause:

"We hold these truths to be self-evident—that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men."

And along with these words, somebody inserted a clause reprobating the enslaving of the inhabitants of Africa. The latter clause was stricken out, as Mr. Jefferson said, in complaisance to South Carolina and Georgia, and he added:

"Our Northern brethren, also, I believe, felt a little tender under those censures, for though their people have very few slaves themselves, yet they had been pretty considerable carriers of them to others." (Liberty Documents, Hill 192.)

When they came together to write the Constitution in 1787, the same difficulty obtruded itself and produced the compromise found in Article I, Section 9:

"Migration or importation of such citizens as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808."

After a stormy session, lasting months, during which time the apparently irreconcilable differences repeatedly threatened to break up the convention, the Constitution was at last adopted. Even then it was not agreed to by all the delegates. Mr. Randolph, Mr. Mason and Mr. Gerry declined to sign it. Mason went so far as to say that the government, under it, would commence a moderate aristocracy and after it had wobbled about for a few years, would result in a monarchy or a corrupt oppressive aristocracy.

New York, Rhode Island and Virginia agreed to the Constitution—with reservations—and before all the original 13 states had ratified the Constitution, 10 amendments were made thereto and two others were added before 1805.

From 1804 to 1865, the Constitution, without amendment, outrode all the storms that confronted its career. After the close of the rebellion, by the adoption of the Thirteenth Amendment, the people of this country, for the first time, made good so far as rights and privileges in government were concerned, on the doctrine of the declaration that all men are born free and equal.

No one can read the story of the Constitutional Convention of 1787 and give any serious thought to the affairs of human beings in relation to their government, without being convinced of the fallibility of human judgments and that the lives of men, in relation to the lives of their fellowmen, must be full of surrenders and compromises and that no government, where men are even tolerably free under the law, can be perpetuated or long survive unless the people who hold the power that makes it and keeps it, are willing to submit themselves daily to compromises and to be always ready to meet, with tolerance, the many things that necessarily and repeatedly result from weakness and imperfection in human beings.

There never was a time when there has been such unrest among all our people, or such uncertainty as to what action that unrest will produce and what the consequences of it will be, as exists now.

I know nothing about the science of government, neither does any one else. (If you ask for proof, I will have to tell you that my witnesses have been a little scattered by the late war.)

No people ever had a finer conception of the rights of men, nor has any people ever written or proclaimed higher, finer, or more unselfish ideals and purposes than were written and proclaimed in our Declaration of Independence.

Neither has the world yet produced a better fundamental plan of government than that contained in the Constitution of the United States.

Our government was instituted to secure to mankind the right to "life, liberty and the pursuit of happiness," and yet after nearly a century and a half of national life, our people have not the liberties they ought to have; in the pursuit of happiness they are hindered and bedeviled in a thousand ways that are unnecessary and life is not secure for any man whose position in the world makes it seem undesirable to some people that he should continue to live.

I hear some one saying, "True, conditions are not ideal, but they are pretty good." No one is contending for ideals. Neither ignorant idealists nor any other kind of idealists have any business trying to shape, regulate or direct the ways of government, established among red-blooded men and women for the purpose of securing to them the right to "life, liberty and the pursuit of happiness."

Many of the difficulties with which we have to contend and with which government has undertaken to deal, were not, and never ought to have been, governmental problems at all.

Every community difficulty produces a statute. Almost every human movement and every use of property are regulated by some statute or ordinance. Many of them are unfortunately enacted to satisfy some momentary clamor, and what is more unfortunate, are never thereafter enforced. We have not yet learned, as Senator Root said we would some time learn, "That salvation does not come by statute."

II.

The fundamental difficulties are not numerous, nor are they hard to discover.

Those things that have destroyed governments and that are working our confusion now are things which have been labeled as "obvious and common-place" and of no consequence and, therefore, unnecessary to be considered.

Consequently, we are often surprised when we ought not to be. This is well illustrated by two things which were long ago labeled, by people who ought to have known better, as "obvious, common-place and tiresome." Their recent emergence as constitutional amendments seems to have taken everybody opposed to them by surprise.

Congress submitted a Prohibition Amendment and it was ratified by the states. In legislative halls and every place where a speech could be made, and through the public press, the world has been told that the Prohibition Amendment, and the legislation consequent upon it, was a part of the hysteria growing out of the war and that a sober-minded Congress would never have submitted the amendment and that it would never have been ratified by sober-minded legislatures.

Have not the causes which produced the Eighteenth Amendment been openly and obviously at work for nearly half a century and for quite a number of years has it not been certain that unless the causes working for it were removed, constitutional or statutory prohibition would inevitably come?

Of the many causes, I will only mention three and some, if not all of them, I am sure you will recognize as being influential in forming a public opinion and shaping the way toward prohibitive legislation and you will readily recognize that neither of them was produced by any sort of hysteria.

First: For many years railroad employees have been prohibited from drinking or from going into saloons whether on or off duty.

There are over two million men in the railroad service. While that prohibition was not absolutely enforced, yet it was practically so, and not only the men themselves, but the public generally, readily recognized and agreed that John Barleycorn would not make a good engineer for the twentieth century, nor a good train dispatcher, switch tender, nor a good servant in any capacity in any business.

Many men who were very liberal in their own conduct and in their own use of intoxicating liquors, have, in every way possible, for many years, discouraged, and in many instances prohibited, the use of intoxicants by their employees.

Second: Life insurance has had an enormous growth in the last 50 years and has become a stable asset, protection and security not only for the family, but in business, and every medical examiner has, for years, scrutinized with great care the drink habit of applicants and has written "No" across their applications.

Almost every other medical man has for years habitually condemned alcoholic liquor as a beverage and in recent years, many of them have denied its value as a medicine or drug.

Third: Men interested in the sale of intoxicants, have not been content to establish saloons to the extent necessary to meet the normal demand, if there is such a thing, but have insisted on planting them anywhere and everywhere. In many cases, there have been such a small number of men to each saloon, that the enticement and debauchery of women and minors, to keep saloons going, became perfectly apparent to every one.

Retail liquor dealers, as a class, have persistently violated every law made for their regulation and have impudently, openly and brutally dominated local politics. The brewers, through their own selfishness and greed, have been the most powerful ally to the men they have called prohibition fanatics.

These, and many other like influences, have been open and to every thinking man, have been obviously at work for many years.

The end may have been hastened by war conditions, but the real cause of the end was not hysteria.

Some people have affected surprise at the submission of the Woman Suffrage Amendment, but the causes that paved the way for that amendment have been open and obvious for many years.

It has been publicly advocated, talked about and insisted upon for a half a century. As a matter of fact, the amendment, as submitted, is the text as drawn and advocated in 1875 by Susan B. Anthony.

Legislation in recent years has firmly established for women their independent property rights and from the days long before the Boston Tea Party, our people have insisted that where there is taxation, there should also be representation.

Since the failure of male issue of Zelephehad, and the decreeing by Moses, to his petitioning daughters of the right to succession in name and property, the question of women's rights has been far from a dead issue in the world.

Every avenue of business has been, in recent years, open to women. They are becoming lawyers, doctors, merchants, teachers and preachers. This Association, at is last meeting, opened its doors to them. They have filled the positions into which they have gone acceptably and well. In peace and in war they have shown that in every branch of relief work women are not excelled in skill, judgment and endurance.

III.

The difficulties that are, to my mind, fundamental and which threaten the life of our government itself, are just as open and as obvious as the causes that worked for prohibition and women suffrage.

First: The first and a most dangerous difficulty is that we have set up a melting pot under which we built no fires, or if we did,

we let them go out many years ago. As a consequence, most of our great body made up of foreigners are, even if they had any such desire, wholly incapable of even becoming students of our form of government.

Second: Our fathers established a government with the source of all power back of it in the people, to secure, as stated in our Declaration of Independence, "The right to life, liberty and the pursuit of happiness."

Our second great difficulty is (leaving out of consideration the operations of the melting pot necessary to condition the millions of foreign born even to become students of our form of government), that we have left a people who have grown very numerous under a government which has become large and complicated, wholly ignorant and untaught as to the meaning of "life, liberty and the pursuit of happiness" under a constitutional government and wholly ignorant as to the quantity and quality of responsibility that rests upon the individual. There have been permitted to grow up unrestricted and unrestrained, conditions that have not taught democracy; but that unless destroyed, will make a democracy impossible.

The third, and possibly an unsurmountable difficulty in the way of the realization of a true democracy, is that we are trying to construct a democracy without using some of the essential elements.

To make a real democracy, there must be surrender, compromise and service by everybody. That condition does not exist under our government now and never will exist while we have, as we do have, large bodies of men who have and use the power or the money to influence and mold, for selfish purposes to a large extent, the destinies of our nation either through the government or in spite of it. The latter condition belongs to an aristocratic and not to a democratic form of government—and if the latter character of influence is wielded, it is just as destructive of democracy, whether wielded by so-called capital or by so-called labor.

These three difficulties are by no means a catalogue of all our ills; but I am convinced that every considerable difficulty can be directly traceable to an almost blind disregard of the causes long open and obvious to every student of government.

MELTING POT.

The salient facts pertaining to our population of foreign origin have been so often told that it seems unnecessary to more than refer to a few of them. In the first place, one or both of the parents of 35,000,000, or over a third of our entire population is foreign born—13,000,000 are foreign born.

Over half a million of registered men could not, at the time of registration for the last war, understand military commands in the English language.

For the last 20 or 30 years, immigration has been largely from Southern and Eastern Europe, where a large percentage of illiteracy prevails, where the habits and customs and the ideals of the people differ widely from those of America. Foreigners have been permitted, in years past, to form and maintain organizations "for the purpose of maintaining or securing political unity and independence and perpetuation of their own native land."

Their organizations have been formed and permitted to exist, in which the United States, their adopted country, has often had less than an equal chance with their native land.

All over this country, schools have been set up and maintained for the purpose of teaching foreign languages, and the charge is made that in our school system more money has been spent for the purpose of teaching foreign languages to American children than is expended for the purpose of teaching our language to foreign children.

Until the war caused some of them to be eliminated, there were German-American societies, German-American banks, German-American business concerns, Irish-American societies and Irish-American concerns of one sort and another and some sort of a hyphenate for every kind of a foreigner having his home in America.

When it became necessary to make materials for use in the great war against America's enemies, it not only was found that many important organizations were wholly owned by foreigners, but—what was much more unfortunate—that almost every great factory of this country, where ammunition, guns and other equipment had to be made, was filled with foreigners, many of whom

actually came from enemy countries, or were sympathizers with those against whom our country was fighting.

Originally, we boasted that our country was to be an asylum to which the oppressed and overburdened peoples of all the world could come and enjoy a new life and a new liberty under a democratic government. That, for a time, was probably the reason that most immigrants came. Those days have long since passed. Very soon, from beyond the Alleghanies, from the rich prairies of Iowa, Indiana, Illinois, Kansas and Nebraska, somebody carried into Southern and Eastern Europe news of "the grapes of Eschol." Since then, hordes of foreign born, many of them yet after years of residence unnaturalized, have done and are doing the work and have drawn and are drawing the wages of our protected industries.

In 1910 there were 2,748,000 foreign population in New York. Nearly 600,000 of these, 10 years of age and over, were unable to speak English and 360,000 were illiterate.

From 1903 to 1914 immigration increased from 875,000 to 1,218,000. In 1914, by far the largest body of immigrants came from the following countries:

Scandinavian	36,000
Ruthenian	36,000
Russian	44,000
Magyar	44,000
Greek	45,000
German	79,000
Croatian	37,000
Hebrew	138,000
Polish	122,000
Italian	251,000

It is within the knowledge of almost every one who has been in the large factories of this country that no one can work his way through any considerable factory unless he has either a guide or the ability to speak several foreign languages.

The disposition to give the place of their nativity preference over the interests of their adopted country, was forcibly illustrated within two weeks of the time of the writing of these words by men who, in order to emphasize their advocacy of Irish freedom, saw fit to hiss the name of the President of the United States. As I write these lines, men in an industry making

machinery necessary in gathering in this year's harvest, struck, and sent a committee to confer with the management. Four out of the six members of that committee were *not* citizens of this country.

Inasmuch as men have come to this country from foreign lands and, whether they have become citizens or not, are enjoying the privileges and protection afforded by residence here, they should be taught in no uncertain way that they have no right to place America and American institutions second to any other nation or proposed nation on earth, and we should start the fires under our melting pot and keep them burning, until every man, whether born in this country or out of it, has either become thoroughly and wholly American, or, if he is incapable or refuses to become American, is driven back to the country from which he came and upon which he has bestowed his first and best devotion.

One of the first things to be done in this connection is for the government to see to it that no applicant shall have bestowed upon him the honorable badge of citizenship in this country and given the power of the ballot and the protection of our government unless he shows, by unquestionable proof, that he has the knowledge and capacity to understand our American institutions, our American scheme of government, a fixed and well-grounded determination to renounce allegiance not only to every foreign potentate and power, but to every foreign "ism" and scheme of government not reconcilable with our own, and, lastly, unless he shows a moral spirit and purpose to adopt our scheme of government as laid out in the constitutions of our states and of the nation without any reservation whatever.

Unless we are able and willing to start now and do those things that are obviously necessary to make the large foreign part of our population fit and willing to understand what a real democracy is, and ready and willing to do the service, to make the sacrifices and to accept the compromises necessary to make and maintain a democracy, then we will continue to fail to get any useful and useable product from our melting pot, because we persist in ignoring the obvious.

Neglect in Teaching.

Our obvious neglect to take the necessary steps to Americanize our great foreign population is only a part of our neglect. All

our people should have proper instruction as to the meaning of the citizen's right to "life, liberty and the pursuit of happiness" under our Constitution. All the people should be taught the quantity and quality of responsibility that rests upon each individual.

Is it not obviously true that we have ignominiously failed to do these things?

Our much boasted public school system, that is supposed to be the breeding and feeding ground of democracy, loses a large per cent of all pupils in their early teens, and before they have any controlling knowledge of the meaning of the words "democracy," "liberty" and "liberty under the law," etc.

During the war, there was much talk about "liberty," "respect for the flag," "patriotism" and kindred things, and we learned to stand quite respectfully at attention while our national air was being played; but who was not shocked at the abandonment of all those things from the very minute the armistice was signed?

Since the war, we hear the same old talk about the "liberties of the people," "freedom of speech" and the like that we heard before the war.

And where they are spoken of, and a right to them asserted, it is asserted as an absolute right unlimited by law, and without any reference to the rights or liberties of any one else. This sort of teaching is false. No democracy can be established, nor can one live under such teaching.

It must be perfectly obvious to all of us that, when we teach by act or word, that by "liberty" is meant the right of unrestrained action, limited only by the will of the person acting, we are teaching a kind of liberty that no democracy can guarantee, deliver or permit. Neither can any other government guarantee or deliver it. An absolute monarchy might deliver such rights, to a few favorites, but never to the masses.

One reason is that the unrestrained will to act is seldom harmonious in any considerable number of people, during any long period of time.

In one of the reports of this Association, I find this language:

"From the foundation of civil society, two desires have been at work striving for supremacy. The desire of the individual to

control and regulate his own activities in such a way as to promote what he conceives to be his *own* good. This we call 'liberty.' Second, the desire of society to curtail activities of the individual in such a way as to promote what it conceives to be the common good. That we call 'authority.'"

I have the greatest respect for the man who wrote those lines; but very respectfully and most emphatically, disagree with him. In the first place that is not a definition of liberty in civil society. In the second place—there seems to be an unavoidable intimation that that which is defined as "liberty" and that which is defined as "authority" are in opposition. That too is a false notion. It is the authority of civil society that makes the liberty of civil society—neither can exist in a democracy without the other.

That which might have been said or done half a century ago with little fear of widespread consequence for either good or evil, would be likely to have far different consequences if said or done now, because of the fact that the American public has become a vast body of readers of current events and because of the fact that there has been established a great system of news gathering which is so efficient that within each 24 hours almost every happening of any consequence throughout the world is gathered, printed into newspapers and immediately distributed, not only in the cities and towns, but even in the rural districts, over night.

Two Great Teaching Influences.

There have been long and constantly before the American people two great teaching influences that have been, all during the year 1919, so constantly and so obtrusively before the public eye that almost everything else has been, for the time being, obscured and forgotten. One of these influences is political and the other is industrial, and strong endeavors are now being made to convert the industrial influence into a political one.

The teaching of the political influence comes to the people, to some extent through the conduct of political campaigns by which some men are brought into office and others are defeated; but to a much greater extent through the administration of public affairs by the party successful at the polls and by the so-called criticisms from the defeated party. These so-called criticisms are far too often made up solely from bald and brutal falsehoods,

which are not designed and intended to bring about a better administration of governmental affairs, but are designed and made in utter disregard of the interests of good government and for the sole purpose of hindering and embarrassing the party in power and of weakening and discrediting it before the people. That character of so-called criticism is continually poured into the ears of the people and is not directed against parties only, but against individuals as well.

When a man enters public life, he becomes everybody's target and every act of his life, regardless of whether or not it has any connection with what he is trying to do, is repeatedly and ruthlessly exposed to public view if it will weaken and embarrass him or his party.

This same condition of things exists not only in state and local politics, but also in national. The public are taught and believe that but few men in public office, from the lowest to the highest, are either honest or deserving of confidence and trust. People everywhere believe not that patriotism and loyalty to country will not get them somewhere, but that loyalty to party will. That the passport to preferment is neither patriotism, loyalty to country nor ability, but is rather party fealty and party service. As a consequence, incompetent and inefficient men, who can only perform their duties indifferently well, but who often do less, are given the privilege and assume the burden of making the government appear respectable before the people.

Under such influences, should we marvel at the fact that the people do not have confidence in public men and public institutions? These are but obvious conditions to which we have closed our eyes. It does not help the situation to say that "Party organization is necessary, or that we cannot run a government without political parties."

The fact remains that these things destroy the confidence of the people in public institutions, in government itself and in public men charged with the administration of the party's affairs, and leaves untaught to the people the fundamental principles of democracy.

Lack of confidence in public institutions and lack of respect for public men, spell lack of confidence in law and order and breed anarchy and riot.

Labor and Capitol.

The other teaching influence which I have termed "industrial," is represented by the antagonisms between labor and capital so called. The teaching of the industrial influence comes to the people largely through strikes brought about by employees organized for collective bargaining and other purposes, and through lockouts by employers determined for some reason not to meet the demands of employees.

Nearly three centuries ago, Massachusetts by law regulated wages of men and compensation to be paid grinders of grain, sawers of timber, etc. Later there was, in various colonies and subsequently in the states, a more extended regulation by law of wages, compensation, and prices. At times both maximum and minimum wages and compensation were fixed by law.

For a considerable time both the masters and the men—who as a rule in those days worked side by side—for various reasons and to accomplish various purposes, formed voluntary trade organizations; but when the merchant-manufacturer bacame a wholesaler and took orders for merchandise yet to be manufactured, the struggle—yet continuing and wholly unsettled to this day between the employed and the employer—had its origin.

The masters were expelled from the organizations. A century ago, the New York Typographical Society wrote down these propositions:

1. "Experience teaches us that the actions of men are influenced almost wholly by their interests.
2. "That it is almost impossible that a society can be well regulated and useful when its members are actuated by opposite motives, and separate interests.
3. "That society is a society of *journeymen* and as the interests of the journeymen are *separate* and in some respects opposite to those of the employers, we deem it improper that they should have any voice or influence in our deliberations."

Since then employers and employed have gone divergent ways.

Both sides seem early to have discovered and used against each other practically all of the offensive and defensive weapons now known and used. The "strike" was used in this country in the latter part of the eighteenth century. The "apprentice" question, the "lockout," the "walking delegate," the "collateral

strike," the "closed shop" and the "scab" all date back to the same period.

Women entered the unions and also became "strikers" nearly a century ago. The "boycott" is more than a third of a century old. Co-operative organizations are nearly a century old.

As factories increased in numbers and size, as long-distance transportation grew in importance (long-haul transportation seems to have begun with a monthly boat between Pittsburgh and Cincinnati in 1794), as the preponderence in immigrants began to shift from the farmer class to the laboring class, the differences and difficulties between the employer and the employed increased, and public expression was given to those differences through strikes and otherwise.

During the years 1833 to 1837 there were nearly two hundred strikers. Railroad, factory and other industrial strikes from 1877 on, became very numerous. There were 762 strikes and lockouts in 1880, involving 128,000 men. 345,000 men were on strikes in 1887, and over 200,000 in 1888. In 1894 it is said that 750,000 men were striking. During the Pullman strike of 1894 in Chicago, the estimated value of property destroyed was $80,000,000. That strike became known and notorious throughout the world. Almost every person in this country felt the effects of it in some way. It involved many court proceedings, both civil and criminal and a bitter controversy betwen the Governor of Illinois and the President, because of the sending of federal troops to Illinois.

The government became officially advised of all the facts through an extended report made by a special commission.

Time cannot be taken to give even a skeleton outline of the story of what has happened in the various controversies that have been going on almost continuously in one form and another for more than half a century. A mere schedule of the strikes of this year would fill pages. For years, they have involved from time to time the courts, the militia, the army, political parties, and all civil life.

In 1893 an extensive political program was submitted by the convention and unanimously approved by many unions. It embodied many matters now being advocated and some of them are being pressed upon Congress for action, and others urged for incorporation into proposed state constitutions.

It is the belief of the people of this country, gained from long observation and experience, that neither capital nor labor cares much what happens to anybody other than themselves.

It is believed that the disposition on the part of both employed and employer has been to seek that interpretation of the law, which will best serve their purposes; and if the law stands in the way that they ignore or condemn it, and the instruments provided for its administration.

Here is a part of a resolution said to have been recently passed. It has reference to injunctional decrees of courts:

"The fate of the sovereignty of the American people again hangs in the balance. We should stand firmly and consciously on our rights as free men and treat all injunctive decrees that involve our personal liberties as unwarranted. In fact unjustified in law and illegal as being in violation of our constitutional safe guards, and accept whatever consequences may follow."

This went broadcast through the newspapers, and the people have caught its full meaning.

With the course of conduct on the part of labor and capital towards each other and of both towards the general public, almost unrestrained and not corrected for more than a century, is it to be wondered at, that babies are left to hunger and cry for milk while drivers get their wages fixed? Is it any wonder that men in Chicago charged with the public service of doing the sanitary work necessary to the good health of nearly 3 per cent of the people of the nation, and that men charged with the duty of maintaining and operating electric lighting and gas plants necessary for the public safety, should all regardless of their obligation to perform the work necessary for the continuance of the functions of government itself, stop the wheels of government and go upon a strike for higher wages? Is it to be wondered at that the police of Boston have joined themselves to an organization that, if history repeats itself, must necessarily lead to a divided allegiance? Those things have not come to us through secret or hidden influences, but through influences that have been open and obvious for nearly a century and should not occasion surprise.

From the great library building at Copley Square, on whose walls are placed, for the instruction of the people, the stories of the struggles of men, the thoughts of the living and the wisdom

of all the dead, I walked down past the statues of Brooks and Channing and Cass and Sumner and Wendell Phillips—bronze memorials of men, every one of whom was a champion for justice and right, an apostle of liberty.

At Park Place, I came full upon the statue of "Emancipation"—Lincoln with outstretched hand over the rising figure of the negro with the broken shackles still upon his wrists. Beneath I read:

"A race set free and the country at peace—Lincoln rests from his labors."

As I read those words, there came to me a remembrance of race riots at Springfield, at East St. Louis, and since I left home, in Chicago—race riots more inexcusable, more cruel and brutal, more bitter and bloody than have occurred anywhere, and all have been in Lincoln's Illinois.

As a son of Illinois, I stand here humiliated and ashamed because of those black and bloody stains upon her name—spots that although all her people may cry in unison throughout all eternity "Out damned spots!"—yet they will never "out."

And while I am here in the shadows of Faneuil Hall, that was, and yet is I hope, the Cradle of Liberty, I dare not leave unsaid a word of warning against a greater evil if possible than any race riot that could possibly happen.

I am in no critical mood, but merely state plainly a compelling belief that men who by the very nature of their employment are pledged to the duty of preserving and protecting the public health and the public peace, and upon the continuous, unbroken performance of whose duties depends the operation and life of the government itself, should not join themselves to any organization whose chief weapon is the "strike," and the "threatened strike." It is the very essence of the "strike" and the "strike threat" not that the master's interests shall be protected and preserved, but rather that the master's rights and interests shall be injured and destroyed. The duty of the constable or the police to protect the individual and public in any village or town may differ in degree, but not in kind, from the duty of the soldier to protect his country on the fiercest battle-front ever known.

The very idea that a soldier might have quit the Marne or the Argonne while he got his wages raised, is too grotesque to be even put into words.

I am quite sure that when they come to understand, every public servant will see for himself that the use of the strike as a weapon against his government is wholly impossible in theory and practice. "Ye cannot serve two masters."

Shall We Have a Democracy?

We are face to face with the question—Shall we have a democracy? "Shall this nation, under God, have a new birth of freedom," not for a part of the people, but for all the people?

When the New York Typographical Society, in 1817, wrote upon its minute book that:

"Experience teaches us that the actions of men are influenced almost wholly by their interests, and that it is almost impossible that a society can be well regulated when its members are actuated by opposite motives and separate interests"

it wrote the whole, the eternal problem of democracy.

Because of the "almost impossible," the master and the men parted company and their problem has become an accute national and international problem.

Will we as a people because of the "almost impossible" continue to be blind to that which must be obvious to every one:

1. "That no democracy can exist where the actions of men are influenced almost wholly by their own interests; but can only exist where men have knowledge and intelligence and are willing to live honest and unselfish lives?
2. "That all government is necessarily a burden and every unnecessary law is an unnecessary burden, and becomes a source of complaint and criticism?
3. "That in a democracy, every law should be unnecessary, that is not required to direct the ignorant and restrain the vicious—except necessary rules for instruction and uniformity?
4. "That to do as you would be done by is not simply the Golden Rule, but is an absolutely and imperatively necessary rule of conduct in a democracy?
5. "That 'government by force' has always failed and always must fail, unless the power back of it is wielded by humane, capable, unselfish, honest men supported by a national morale?"

Common honesty, unselfishness, are not merely idealistic things to be applauded in fine speeches. Justice is not a thing to be orated about, but only administered if at all through the courts. To be individually honest, to be individually unselfish, to individually deal justly with your fellowmen are necessary elements in the making of a democracy.

The man who comes without those things comes empty handed, unfitted to share in the rule of the people.

They are the warp and woof of liberty.

What is liberty? It is truth lived 100 per cent. What is truth? Pilate asked the Christ: Truth is the eternal harmony of things. That which is true—spoken or done today, will remain true and will fit into and harmonize with every other true word or deed wherever spoken or done, while the universe lasts. Truth is not a fanciful unattainable thing. John Marshall found the truth, and it made his decisions great and enduring. Washington and Lincoln, and Roosevelt, though at fault many times and in many ways, found and lived great human truths, and won eternal fame.

Harmony and truth are everywhere inseparable. It may be "almost impossible that society can be well regulated when its members are actuated by opposite motives and separate interests," yet this is not a rogue's world nor a fool's paradise. I have confidence that the American people will keep their heads cool and their feet on the ground, and that wise counsels will prevail not only through present difficulties, but through every one yet to come. That they will learn that liberty to be had must be lived, and that it can only be won and kept for a nation by a people who are willing to and who do individually live moral and unselfish lives. When we learn these things and do them, we will build up a national pride, a national love of justice and fair play, from which will come a nation of morale that will make a democracy impregnable against every assault of false ideas or force of arms—then and then only will "the nation under God have a new birth of freedom" and a government of *all* the people, by *all* the people, for *all* the people.

THE NATIONS AND THE LAW.

BY

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In accepting the invitation to address this learned professional body, I have wished to speak, not as a lawyer—which in this presence I should feel to be presumptuous—but simply as a citizen. And yet, in what I shall have to say to you on this occasion, it is to you as lawyers, as well as citizens, that I desire to speak; because, at this time, more than at any other since the revolutionary movements of the eighteenth century, there is a wide-spread upheaval of the established order, accompanied by very radical demands for social change. Unlike that earlier revolutionary movement, which was actuated by a general desire to substitute the rule of law for a régime of arbitrary power, the present movement tends to ignore, and even to challenge, a system of social order based on the fundamental principles of justice, of which you, as members of the Bar and of the Bench, are the entrusted guardians.

The conclusion of the great war, in which our country was unexpectedly called to participate for the defense of the rights of our fellow-citizens and the dignity of law itself, and in which it has borne such an effective part, has left the world in a condition of impoverishment, unrest, and uncertainty that creates a state of deep anxiety in every thoughtful mind.

We are confronted with a world-community which at present possesses no generally accepted and enforceable world-law. I speak of a "world-community," because the achievements of inventive genius in establishing human control over the forces of nature have so nearly annihilated space and so accelerated the possibilities of time, that the old isolation is no longer possible. There is no mountain so high, no ocean so wide, as to furnish an impassable barrier between nations. The day of fortified frontiers has passed away forever. The air has become a highway of

swift invasion. This change of international relationship has occurred so suddenly that it is difficult to appreciate its significance. Little more than 50 years ago, Bismarck said: "The Orient lies so far away that I do not even read the reports of our ambassador at Constantinople"; but, today, by the air route, the Golden Horn is nearer to Berlin in time than Paris by the through express.

The experience of the war has taught us that henceforth no nation can preserve its seclusion and live apart. Actively or passively, its life is affected by the needs, the animosities, and the purposes of other nations. Whatever our theories of national policy may be, we cannot escape some kind of relation with every other nation of the world. Our argosies will be afloat on every sea, and there will be no port that will deny them admission. The important question is, What shall be the basis of those relations? Shall we base them upon a combination of world-wide power, or shall we base them upon the principle of free co-operation under the regulation of accepted law?

When we consider how incalculable the relations of national power have become, how mutable and how ephemeral they have been, with what fatality the weak have always been subjected to the will of the strong, and how imperiously the strong have always ruled the weak, we seem to be compelled to accept the conclusion, that every form of power is a danger and not a safeguard, unless it is both responsible to a legally organized community and under its control. Underlying the whole problem of international intercourse and obligation, therefore, is the question of the stability, the integrity, and the responsibility of the national units which compose the world of states with which we have to deal.

If the world-community is ever to possess a world-law, it will depend upon the legal structure and purposes of the states by which that law is to be maintained. We cannot expect international peace or lawful procedure, unless the nations are capable of securing obedience to law within their own jurisdiction, and are so organized and so controlled as to admit and execute their legal obligations to one another. The fundamental issue of world order is not, therefore, the possibility of forming a union of powers strong enough to impose its will upon other states, which

would in effect destroy their responsibility, but the question whether the powers entering into such a combination are disposed to bind themselves to the acceptance and observance of definite legal principles, irrespective of their commercial interests and military strength. Here is the test by which any such proposal must be judged; for states based upon the idea of law, existing to enforce the law, and charged with responsibility for the protection of rights under the law, would change their whole aim and character if they participated in any combination of power not itself controlled by law.

We must, then, repudiate, as inconsistent with the nature of a truly constitutional state, any form of international association that does not assume as its first postulate the authority of international law over all nations, regardless of their magnitude, commercial interests, or military efficiency. In this one respect, all sovereign states—great or small, rich or poor, powerful or weak—stand upon the same footing, and must be subordinated to a common law. No union of forces aiming at preponderance of power for the purpose of controlling the commerce of the world can meet this test. No mutually defensive alliance of great powers designed to establish a permanent control of subject nations can face this conception of law. Here the jurist and the politician must part company. They do not speak the same language, nor think the same thought. The one has in mind the erection of an institution of justice, created by the common consent of nations; the other, the preservation of empire and the exploitation of the defenseless, by collusion with compliant copartners and the suppression and ultimate extinction of possible rivals.

The attitude towards these antithetical and irreconcilable conceptions of international relationship assumed by different nations will depend upon their idea of the nature of the state as a political institution. If the state is arbitrary power, and its chief end is to extend its jurisdiction and increase its possessions, then the idea of any universal principle of equity limiting its activities and nullifying its aspiratons seems hostile to its purpose of existence. In that case, its statesmen will think first of the means of extending power; by war, if the nation be a military one; by supremacy on the sea, the great highway of trade, if the nation possesses

maritime interests; by diplomacy, if there are still possibilities of national development through secret bargains and a distribution of "compensations." In an age when the cost and liabilities of war are great, such nations will naturally be deeply interested in peace. They will be eager even to enforce peace; because an enforced peace, under the aegis of predominant power, is the condition of securing and augmenting the wealth which war, like a pestilence or a cyclone, would ruin or sweep away. But they will hesitate to commit themselves to the observance of any definite law, or the judgment of any judicial tribunal, which is not under their influence; and yet they will be eager, in order to appear fair and honest, to profess their attachment to justice, taking care, however, to accept no legal obligations which they cannot in some way evade.

In this description of a state whose being and end is power, I am not thinking of Treitschke's famous definition, or of the Prussianized German Empire as the only example of it. It applies to every really imperial power, whatever its pretensions of democracy may be, which aims at colonial expansion, holds subject peoples under its absolute control, and thwarts their efforts to obtain the privilege of self-government.

I shall not, in this anxious and troubled time, attempt to specify particular governments, much less particular peoples. I do, however, call attention to the fact, that governments change, and that they are always composed of men. No man can with certainty predict what the government of any European state will be ten or even five years from now. It would be an error to suppose that imperialism is essentially dynastic. Its present phase is that of race domination and economic control. Imperialism is not so much a form of government as it is a lust for power. The greatest danger to the peace of the world today is the menace of the socialized state; which is based on a crassly materialistic philosophy, and if generally realized would transform whole nations into industrial and commercial corporations claiming absolute sovereign authority, pitted against one another in rivalry to possess the wealth of the world.

I am making these statements with no purpose of disparaging any nation. I am making them because they apply to all nations; whose governments change, and whose unregulated power is

subject to the impulses, the passions, the interests, and the ambitions of men. I am making them, because, to my mind, there is incalculable danger to human rights, to liberty, to national independence, and to national honor, in any partnership of power that looks toward mutual advantage over other nations, and is not itself under a rule of law. I shall here make no specifications; for we are here to discuss principles, not characters. The law knows no distinctions. It singles out no objects of attack. Forms of government are not its master, they are its instruments. Democracies that choose power, and not law, as their governing principle may be as absolute and as arbitrary as any single autocratic ruler, and much more difficult to withstand.

It is the challenge to law, in whatever form it comes, that constitutes the danger. And yet it is challenged. Arbitrary power knows no law. Those who represent such power see in law, what it is, their persistent enemy. Such men—statesmen, demagogues, and class protagonists—seek for colleagues and alliances, as the necessary aids to the execution of their private policies. They are anxious to engage in their adventures, and to incriminate by partnership, the innocent, the unsuspecting, and the inexperienced. For this they shelter their designs by professions of virtue, loyalty, and devotion to high ideals. But the test may always be applied, if there is a disposition to apply it. In its international application the formula is: What relics of imperialism are you ready to abandon? Are you ready to accept, without qualification, a body of law based on universally received axioms of equity, axioms which you impose upon your own nationals in all their civil and criminal relations? Are you willing to modify the doctrine that the state is power, by admitting that the state is power wholly subject to fundamental principles of law?

There is a conception of the state radically different from the one I have just described. It was foreshadowed by a philosophy of enlightenment that disclosed the insolence and usurpation of power unregulated by law, and demanded the abolition of it; but its logical conclusions were first embodied in an actual form of government by the American colonies in the last quarter of the eighteenth century.

It should not be overlooked, and yet I have never heard it

emphasized, that, in declaring their independence of the British crown, those colonies uttered a protest, not primarily against the right to tax, nor yet against the withholding of representation in the law-making body, which were secondary, but against the King's refusal to grant the colonies a government based on law. The first charge "submitted to a candid world," to use the language of the declaration, is: "He has refused his assent to laws of immediate and pressing importance and necessary for the public good." That was the gravamen in that terrible indictment. It runs through all the 12 subsequent accusations of misrule, ascending through the entire gamut of complaint with increasing intensity, declaring among other things, "He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers"; and ending with the climax, as if it were the acme of perversity; "he has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws, giving his assent to their acts of pretended legislation." The claim to law, as the most precious possession of citizenship, recurs at intervals throughout the remainder of the indictment. Three times, in the midst of the 14 additional specifications of usurpation, the writer of the declaration returns to his demand for unperverted law as the one central purpose of the document.

On its constructive side, the same spirit animates the thought. "All men are endowed by their Creator with certain unalienable rights"—which implies that the true source of law is in the nature of man, and not in the possession of arbitrary power; and, hence, "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

It seems like resorting to commonplace, to repeat these familiar words; and, in fact, it would be, were they not usually recited in a manner so mechanical as to obscure their deep significance. Since these expressions became a part of our breviary of patriotism, our foreign contacts have been numerous and intimate, particularly those of the educated world with the German universities. Through that influence and a dread of provincialism, the precepts of a contradictory philosophy have been introduced into our political thinking. It is the omnipotent state, not

the moral attribute of human personality, it is contended, that is the true source of law. Law is, therefore, to be imposed from above, not derived from the nature of that which it is to govern. Established and maintained by military power, the state exists for itself, and is the sole creator of rights. As master and proprietor, the state not only commands without limit, but may expropriate without consent.

Under the plea of superior national efficiency, these political and economic doctrines now offer, in democratic countries, an easy opportunity for class control. As state supremacy, in its socialized form, has grown in favor, men have gradually abandoned the venerable doctrine of "Natural Rights," which, in substance, is simply the axiom that there are in human personality inherent claims to just treatment, an axiom on which, in the end, all jural conceptions rest, and upon which the whole structure of the American system of law and government is founded.

To the practising lawyer this doctrine is naturally of little interest. He wins no cases by it, except perhaps when he appeals to the sentiment of justice, still undefined, but a living fountain of righteousness, in the reason and the conscience of a jury. His interest is in actual statutes, judicial decisions, and the accepted precepts of the common law which the great English judges—the finest ornament of English life and character—developed through their interpretation of customs by which generations of men had found it possible to live and work together. Small, indeed, would be the retainers that clients would pay for disquisitions on the "rights of man"; and yet the doctrine of "Natural Rights" will live in the hearts of men as long as human nature endures and can find a voice. To the lawyer it may be nothing, but to the people it is everything.

The honest client comes to his lawyer in the faith that civilization has provided a way to give him justice. His lawyer may know that, through his client's ignorance of what justice really is, or through the law's imperfection, his hope may not be realized. The difference is that the client's idea of right is subjective, the lawyer's knowledge is objective. The distinction between "inherent rights" and "legal rights" is, therefore, evident. Looked at historically, we see that rights have generally been treated as if they were not inherent, but merely the gracious

gifts of governments—concessions of privilege from the throne of power. The founders of the American state revolted against this idea of law. They were anxious about their inherent rights, and meant to make some of them at least legal rights. In England, long before that time, the "Commons" had obtained through their power to control the purse, the privilege of making laws, subject to the approval of the King and the Lords, and this was also the proud heritage of the colonists; but no inherent right of man, as man, had ever anywhere received a formal legal guarantee by any government. Even Magna Charta had not done that; for, under it, nothing was reserved to the individual which the "law of the land" could not take away. But the American bills of rights demanded certain specific guarantees as the condition of their consent to government. Believing these rights to be theirs by virtue of their nature as men, they could not permit government either to withhold or accord them. They, therefore, created a government which was bound, by the charter that gave it being, to respect and protect life, liberty, the enjoyment of property, religious freedom, free speech, and free assembly, when not hostile or treasonable to the government instituted to give them protection.

This was an entirely new conception of governmental authority. It founded the state upon a fundamental law, to which all legislation must conform. It was intended to forbid and prevent government by arbitrary decree. It affirmed that there are "natural rights" which all law makers must respect, and which even majorities cannot legally override unless they have first torn to shreds and utterly destroyed the charters of liberty in our state and federal constitutions—a danger to which our liberties are always exposed.

Whatever may be held regarding the authority of "natural rights," there are certain fundamental human claims to just treatment and to strong protection, so clear, so urgent, and so indisputable in their outcry for recognition and security, that the undertone of their pleading runs through all the free expressions of the human mind since thought began to be recorded. Until they are established—and they can be established only through the law—brave men will dare to say, as Theodore Roosevelt, said to his law professor: "Professor Dwight, do you tell

me what you have said is the law? Then I stand here to say, that the law is wrong!"

All honor to this passion for justice; but justice in complicated cases can rarely be ascertained by one man, or in one moment. Like truth, it requires long, ardent, and deliberate pursuit. It is not to be determined by the will of the uninstructed. It cannot be arrived at by the response to a pleader appealing to a class possessing an interest in the decision. If the decisions of the Bench are imperfect, the decisions of the street are certain to be more so. Justice must come, if it can be attained at all, from a deliberate survey of conditions that looks through the whole problem and reaches the ultimate principle by which it may be solved.

There was superb wisdom in embodying in the federal constitution two provisions which had never before been united in any federal system: (1) The reservation to the people of certain rights which could not be legally taken away by legislative action; and (2) the creation of a judicial tribunal with power to interpret the fundamental law, and thus prevent legislative encroachments upon the inherent rights which it was designed to safeguard against the danger of invasion by any power within the state. For the first time in the history of the world, the humblest citizen was guaranteed protection even against the government itself.

Founded upon the idea of law, and existing under the protection of law, the United States of America, more perhaps than any other sovereign power, has aimed to establish its relations with other governments on the basis of law; and has instinctively shrunk from extending them, even when provoked by the turbulence and insolence of comparatively impotent neighbors, on a basis of preponderant power. In all the international councils in which we have as a nation hitherto participated, our government has endeavored to establish law as a standard for the conduct of sovereign states. Being itself a creation of law, it has appeared natural to base its foreign relations upon it. Very early in our history, international law was adopted as a part of our legal system. The reasons for it were obvious. It had not only been accepted in the common law which we inherited from England, but was expressly recognized and appealed to in our foreign

negotiations and in our courts. Not only this, but the principles advocated by the great writers on the law of nations were identical with those upon which our conception of the true nature of the state was founded. Grotius, Pufendorf, Burlamaqui, and Vattel, were favorite authors with Adams, Hamilton, Franklin, and other colonial statesmen, before the Declaration of Independence, and were constantly consulted both in the Continental Congress and in the Constitutional Convention of 1787. They, too, believed in, and advocated, "natural rights," and found in them a foundation for a law of nations far more extended, and even more authoritative, than the customary usages of the time.

International law created through the treaty-making power has always seemed to American statesmen the very perfection of legislation, because it is founded entirely upon free agreement, and not at all upon compulsion; and, besides, under the American Constitution, it is, in its final determination at least, the work of an elected representative law-making body. No method could be devised that would render the law, when thus agreed upon, more completely the expression of the mind and purpose of the peoples in whose behalf it is made. The fact that such law-making treaties are now habitually negotiated in all constitutional states by responsible ministries, themselves members of the legislatures of the countries they represent, adds immensely to the perfection of this method of procedure. Here is a process by which a complete system of world-law can eventually be created; and it can be accomplished as soon as the great powers are prepared to act under a rule of law.

In the present international situation, therefore, we turn with more than usual solicitude to inquire what prospect of such an achievement lies before us.

This interest is further accentuated by the fact that the object of our participation in the great war as a belligerent nation was the preservation of the rights of our fellow-citizens secured to them under international law. No other official reason for engaging in the war has ever been given. We had, as a government, remained neutral, even in the presence of ruthless atrocities, until a further effort to preserve neutrality would have been dishonorable, and a shameful neglect of the constitutional duty of "common defense." It had become apparent that, unless we took

part in the struggle, there would soon be no rule of law by the consent of the governed anywhere in the world.

It is nowhere disputed, that we entered into the war for the preservation of international rights which the law of nations accorded us, which had been brutally violated, and were placed in perpetual jeopardy. Other objects, not contemplated in the declaration of war, have been permitted to obscure the real reason for our engaging in it, and have entirely subordinated that reason in the settlements of peace. With these objects I do not here propose to deal; but it is of importance to note, that, in advising the Congress on April 2, 1917, that Germany's course be declared to be one of war against the United States, the reason for accepting the challenge was stated by the President in the following words: "International law had its origin in the attempt to set up some law which would be respected and observed upon the seas, where no nation had right of dominion and where lay the free highways of the world. By painful stage after stage has that law been built up, with meagre enough results, indeed, after all was accomplished that could be accomplished, but always with a clear view, at least, of what the heart and conscience of mankind demanded. This minimum of right the German Government has swept aside under the plea of retaliation and necessity." In a later passage of his message, the President further specified the reason for the entrance of the United States into the war, by saying: "The German Government denies the right of neutrals to use arms at all within the areas of the sea which it has proscribed, even in the defense of those rights which no modern publicist has ever before questioned their right to defend."

Here is the reason, the only officially stated reason, why the United States became a belligerent in the great war.

We turn then with more than historical interest to inquire what have been the fortunes of international law in the settlements of peace.

An examination of the 14 conditions of peace proposed by the President on January 8, 1918, eight months after the declaration of war, discloses the fact that there is in these rubrics no reference to international law as having been violated, or as something to be vindicated and re-established. In fact, it is not there stated that the United States ever had any reason for entering the war,

unless that may be implied in the second rubric, which demands "absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war"; a principle for which our enemy professed to be contending.

In the proposal of a League of Nations, made on September 27, 1918, the restoration of the law of nations was not included among the five objects to be obtained in the peace. In the correspondence with the Imperial German Government regarding terms of peace, which led up to the acceptance of the armistice, and in the armistice itself, international law was not made a subject of discussion.

That the vindication of violated law required not only a peace of victory, but a peace distinctly punitive of such violations, is clearly evident. Was it not for that crime that Germany was to be punished?

In some vague sense, I suppose, there is a general impression among the people in Germany that the rest of the world has united in condemning the conduct of the Imperial Government, and that the terms of peace imposed upon them are an attempt to punish its offenses; but there are reasons for thinking that the prevailing sentiment among them is simply one of regret that, with all their boasted strength, they were too feeble to win the war, coupled with resentment that they were denied the compromise peace which they expected. In brief, the national mind has not been lifted out of the conviction that the problem of national existence is purely and solely a problem of power.

It would have been an impressive demonstration of the justice of the punishment inflicted upon the German nation and its allies, if, at the time of the virtual surrender under the terms of the armistice, there had been publicly read at Berlin, from the balcony of the palace where William the Second falsely proclaimed a war to preserve Germany from invasion—which many Germans still believe was a justified defense—the speech of Chancellor Bethmann Hollweg, in which he confessed that the invasion of Belgium was a violation of international law, with a proclamation that it was for this, the illegal use of the submarine, and other ruthless violations of solemnly accepted law, that the terms of the peace of Versailles were, in the name of the law, to be visited upon the nation that had supported these atrocities.

Taking into account the circumstances in which the war was begun by Germany, and the purposes of the Central Governments and their allies, severe penalties based on the principle of reparation alone were plainly merited. But there is a higher point of view than this. It is not merely that the Belgians, the French, and others were irreparably wronged and injured. Beyond and above this, an offense was committed against what is most sacred in human civilization, namely, the authority of accepted law and the solemn pledge to observe it. It is upon this ground, and upon this ground only, that the German people, who before the penalties are fully inflicted will have produced an entirely new generation, and will number a hundred million of deeply resentful recalcitrants, could be made to understand that their punishment involves not merely material damages as in a civil matter, but a crime against the dignity and sanctity of law itself. If it were understood and believed in Germany that the United States, and perhaps other powers signatory of the peace, had taken up arms, not for gain, not because they were rivals, not for any advantage over the German people, but solely to vindicate the law—which was their law as well as ours—it could have no other effect than to strengthen whatever law-abiding spirit may exist in the noblest minds, and to set them irrevocably against the military autocracy that induced them by false pretenses to perpetrate this national crime.

I would not be understood as stressing what may seem to many a merely technical point. What I wish to accentuate is, that a punitive peace is an impossible peace, in the present state of the world, unless it is also, in some sense, a constructive peace. You cannot expect that eighty million people, composing a great and capable industrial nation, hedged in by states less potent in numbers and not more capable in military efficiency, will be content to go on, for more than a whole generation, paying heavy indemnities, excluded from every prospect of colonial possessions—especially a warlike people that lately entertained a dream of world-dominion—unless they are permanently either held down by a superior military force, or see in their compliance with the penalty the operation of some system of justice, offering to them an open path of honorable and equal opportunity of life.

It is no part of my present purpose to discuss this problem of power, further than to say, that a punitive peace can be made

really effective only upon condition that it inaugurates a new era of justice, as well of peace, in which the vanquished equally with the victors will be the beneficiaries when the penalty is paid.

We turn then to the Treaty of Versailles, to inquire to what extent this condition is fulfilled; and discover, to our disappointment, that the covenant of the League of Nations, which we are told is to be the instrument for the maintenance of peace, contains no declaration that sovereign states as such possess any rights whatever. We find in it no provision of law by which their conduct toward one another may be judged; no promise of a court before which their wrongs may be brought and their legal rights judicially determined; no method by which a weak state may legally enforce its right against a great power, if that power is indisposed to recognize its claim; no reference to that "rapidly increasing statute book of the law of nations," as the *corpus juris* solemnly established in the Hague Conventions has been called, and no reference to the violations of it during the war.

I am trying to make these statements with absolute precision, because it is popularly believed that this covenant was designed to do all that it has failed to do. It is true that there is, in the Preamble, a reference to "understandings of international law"; but it contains no pledge to observe the law, or to adopt it as a judicial rule, or to accept it otherwise than as a subject of separate "understandings." It is, indeed, provided, in Article XIV, that "the council shall formulate and submit to the members of the league for adoption plans for the establishment of a permanent court of international justice"; but there is no promise to constitute it or to accept its decisions, and it will be competent to hear only such disputes "of an international character which the parties thereto shall submit to it."

On the other hand, matters of vital national consequence are to be entrusted to the purely diplomatic decisions of the council or the assembly, such as the important question whether an issue is, or is not, one of international law; and, under Article XV, these bodies, unregulated by any law or rules of procedure, are charged with judicial functions, possessing power to make an award which bars one disputant from further asserting or defending his right if the other accepts the decision.

I shall not here undertake to discuss the powers possessed by this league, regarding which there are wide differences of opinion. It is, however, of vital importance to recognize the indisputable fact, that this covenant not only makes no advance in the development of international law, but wholly overlooks the status attained by it, through the work of the great international congresses since the Congress of Vienna in 1815. As an eminent authority has said, "For almost a century the Society of Nations had been working its way toward an international legislature, and had almost reached its goal. It began by the recognition of express consent as a source of the laws which regulate the intercourse of states, side by side with the tacit consent embodied in binding customs. Then an organ was slowly evolved for the formal annunciation and registration of that express consent. This organ was a periodical assemblage of representatives of the governments of all civilized states. In 1907 its membership was almost complete. . . . Then came the day when the firm foundations of the earth rocked beneath our feet, and the light of the sun of progress was quenched in the red mist of war."

We had believed, until the cataclysm came, that a Society of Nations really existed, with the possibility of a legislature based on free consent, a growing system of law, and a rudimentary judiciary. Since 1914, there has been only retrogression and no sign of future progress. A great power, leading others in its train, bade defiance to this whole system. Unfortunately, the nations had not realized that they had a common interest in maintaining it; until, one by one, they were drawn into the vortex of violence that was destroying it. A terrible experience has taught the world, that, unless this highest and most endangered community of interest among nations can be re-established and supported by organized defense, we shall again, in some form, be subjected to the insolence and havoc of arbitrary power.

There is then a vital necessity for the continued union and consultation of the powers which have been the victors in the great war; but it is equally essential that their aim should be the rehabilitation and enforcement of law, rather than a combination of legally unregulated forces.

The Supreme Council of the Conference at Paris has, apparently, not been deeply impressed with this necessity. Allowance

must, perhaps, be made for the fact that it is a political, not a juridical body. It has not considered its decisions subject to any rule of law. It has set no limits to its jurisdiction, and has not been solicitous regarding the source of its authority. It has considered itself empowered, as representing the victors, not only to make terms for the vanquished, which was its prerogative, but to coerce independent sovereign states, fix their boundaries, and determine their destinies.

In view of the fact that it was the violations of international law that brought the United States into the war, the slight consideration given to it in the covenant of the League of Nations has created astonishment in the minds of American jurists. Noting that no provision was made for it in the future, in March, 1919, during the period when the covenant was undergoing revision, one of the most distinguished members of this Association proposed, among other suggestions, an amendment to the covenant, reading:

"The Executive Council shall call a general conference of the powers to meet not less than two years or more than five years after the signing of this convention for the purpose of reviewing the condition of international law, and agreeing upon and stating in authoritative form the principles and rules thereof.

"Thereafter regular conferences for that purpose shall be called and held at stated times."

That recommendation, having been approved by a committee composed of some of the most eminent members of the American Bar, and by the Executive Council of the American Society of International Law, was, upon request of the Department of State, forwarded to Paris.

From the fact that this proposal led to no action, I shall not draw the inference that it received no attention. The source from which it came could hardly permit of its being treated in that manner. I am, therefore, compelled to believe, until further enlightened, that it was considered inexpedient for the conference to recognize any international law-making authority outside the limits of the league itself. If this be true, it is a reversal of the whole theory of legislation by consent. Either, in the purpose of the conference, there is to be no review and revision of international law, or such revision is to be exclusively the work of the league, a minority body in the Society of Nations; and,

therefore, incapable of making law for that society without its consent.

It is a part of the theory of this league, that, henceforth, there are to be no neutral nations, and hence no neutral rights; rights of which the President said, in his appeal for a declaration of war, that no modern publicist had ever before questioned them, or the right to defend them; rights for the defense of which this country has more than once engaged in war.

Until it is assured of the protection of all its rights, no free nation, great or small, can wisely surrender either its right of self-defense or its right to remain neutral in the quarrels of others. No combination of great powers itself unregulated by fixed principles of law can give this assurance.

I offer no criticism upon an effort to preserve the peace of the world by the consultation and co-operation of the great powers, or to an organized agreement on their part to pursue, condemn, and punish an outlaw, even though the culprit may claim the prerogatives of a sovereign state. Such an agreement is imperatively demanded; but it should be dedicated without equivocation or reserve to the service of the law, which it should aim to re-establish, to render more perfect, and to enforce whenever it is threatened with violation.

The whole world cries out for peace, for order, for the protection and the reinvigoration of honest industry. We have been told that America is to save the world and rescue civilization from dissolution. I believe that, while there are limits to national responsibility, our country has a great part to play in this sublime achievement, but we must do it in our way; in the way that has made us, in a little more than a century, the most unified, the most virile, and the most potent single power in the world. And when we ask ourselves what it is that has given us this unity, this virility, and this potency, the answer is, that we have founded this nation upon principles of law, and upon the guarantees of individual rights under the law. That is our great contribution to civilization; and if we are to be of use to other nations, old or new, our first thought must be to remain our own masters, to preserve our independence, to control our own forces as a nation by our own laws, and to protect from any form of detraction or perversion that heritage of organized liberty which has given us peace at home and prestige abroad.

RECONSTRUCTION AND READJUSTMENT.

BY

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It is not astonishing that, in consequence of the events of the last five years, world affairs have become disrupted, disjointed or disarranged. There is demand for reconstruction and readjustment. These words are not synonymous but are akin, and are usually grouped in discussion. There is universal inquiry as to what can be done towards ascertaining and establishing an equilibrium which shall be generally acceptable and prove to be permanent. The questions involved are national and international, domestic and foreign. They are moral, social, political and economic. Practically speaking, the last is of first consideration in the minds of the vast majority, for it involves life, health and comfort. Until one is first provided with food, clothing and shelter, other matters receive scant attention.

The eyes of the peoples of the entire world, since August 1, 1914, and probably before, have been continuously focused on the United States of America. It is not boasting to say that, all in all, we are the greatest of nations. This is susceptible of demonstration by facts and figures. Geographical location, climate, wealth, resources, temperament and fundamental rules of conduct, have furnished to the inhabitants of this country the widest field for progress, prosperity and influence; and with this there is a corresponding responsibility, which we must recognize.

Many of the immediate international questions growing out of the war have, in the main, been settled, or methods for their settlement have been approved by the Peace Council at Paris. It will for the present be assumed that the work of that Council, in substance, will be ratified even though there may be some additions, explanations or reservations to the original draft, not materially affecting the main plan and structure. The major part of the people of this country love peace and abhor war, and therefore

favor the Peace Treaty and League of Nations as a material aid in preventing future prolonged wars. They believe that, under the most difficult and complicated circumstances, the President, as their properly constituted leader and representative, secured the best terms and conditions practicable and that the same should be approved.

Of signal importance there is to be considered by the people of the United States their attitude towards other countries. We have been provoked to feelings of anger and hostility towards the Central Powers and their associates in the war. We are convinced they have disregarded the laws of God and man, and should make restitution and suffer penalties; and this has been provided for. What shall be our attitude toward them? We would not benefit ourselves or others by indulging sentiments of hate or revenge. It is not necessary to forget or to forgive, certainly unless there is repentence on the part of those who are guilty of moral turpitude, but we should at least be sufficiently wise to consider the ultimate effect upon our own interests of unnecessary antagonisms.

From an economic standpoint, considering of paramount significance the question of benefit to ourselves, we ought to resume business relations with Germany and Austria at once. They are capable of producing many articles of commerce which we need and desire, and which are not produced elsewhere in like quality, much as it may be regretted. Like grades of leather and leather goods, woolen cloths and cutlery of various kinds, drugs, chemicals and toilet articles and other things too numerous to mention, we have not been able to obtain during the war as we did previously.

There are at least two good reasons why we should liberally resume the buying of German and Austrian goods. We desire them to supply our own wants, and besides the purchases will have a decided influence in re-establishing the rates of international exchange. We should seek and fully reciprocate the friendship of all other nations whenever it is compatible with principle. We should, if practicable, be neutral as between all other countries if we are to have their respect and confidence. Our position should be uniformly honest, dignified, kind, impartial, and in all respects above reproach. This is right and it

will be profitable. It is a time for the exercise of patience and wisdom and the application of the highest ideals of propriety and virtue in dealing with world affairs. No man liveth to himself alone, and no nation liveth to itself alone. These are truths of daily illustration.

The subject of international exchange, with its present dislocations and discrepancies, is troubling the minds of the great bankers and they must solve the problems pertaining to it. However, it is a part of common economic discussion. The existing irregularities and inequalities cannot be corrected by mere dictum or desire. The shipment of gold is not a cure or a considerable palliative. Agreements for readjustments will not suffice. It would seem to the ordinary observer that in some way we must get back to the original basis of determining relative exchange rates, namely, one of respective credits. If one in New York were desirous of paying a debt in London, and another in the latter city at the same time desired to pay the same amount in the former there would be no difficulty in establishing a fair rate of exchange; and if this equality of credit and debit could be maintained the whole problem would be solved. The practical application of what has been remarked to the international situation is that the United States, so far as possible, should finance other deserving countries less fortunate in rehabilitating their productive capacity and resources, and that we should purchase their products up to the limits of our requirements and ability. Also, that our investing capitalists, through bankers and otherwise, should buy the securities of foreign concerns, the payment of which might be guaranteed by their respective governments. Thus will we evince our friendship for others and at the same time advance our own interests in many ways. The point is emphasized that, as a rule, we help ourselves when we help others, and injure ourselves when we injure others. Better a thousand times if Germany had appreciated this fact in the unfortunate days preceding the precipitation of the war. Better for us if we apply this principle at the present time, not only towards our associates in the war, and all neutral countries as well, but also towards those who were our enemies, and the large majority, at least, of whose peoples we hope, will hereafter be

our friends and our coadjutors in striving to uphold the peace and prosperity of the world.

The early adoption of the American dollar as a basis or standard of currency and values is worthy of universal consideration. Much could be said in favor of the suggestion.

Of great consequence to all countries is the opportunity to import and export supplies of all kinds in exchange for other commodities or money, unrestricted as to location or by discriminatory legal provisions, established rules of business or practices of any kind, so that all shall be on the same basis of privilege. Discussions relating to the open sea, or command over or control of the sea, have frequently been confusing. Interpretation of language has been unnecessarily literal and misleading. A fleet of ships, largest in capacity and fastest in movement, may exercise a predominant influence in international trade, but every nation may provide itself with the best, limited only by its financial ability or policy, and there can be no reasonable objection to the success which follows enterprise and expenditure. The underlying principle is that all the navigable waters and all the ports of entry and shipment connected with these waters, should in times of peace, be free and open to every one on equal terms and conditions; and that there should be continued in force laws and rules to insure these advantages.

Hereafter every nation and every individual must have full opportunity to prosper according to merit. This Americans demand and this they concede. In this statement of principles, there is not intended to be included matters relating to domestic protection, production or safety. It is doubtful that in practice and method the high seas and sea-ports heretofore have been as open and free as commonly supposed; but we have entered upon a new era. We are reconstructing, reorganizing and rebuilding, and must start right. There must be straight thinking and action. There must be equal protection to all, coercion imposed upon none, no waivers of legitimate and fundamental claims insisted upon. When the League of Nations is in full force and effect its provisions must be ample and must be scrupulously observed by all who are parties to it.

Another international question of moment pertains to race or color. By some it is considered delicate, but to the average

person in the United States and in other lands, it appears to be of practical import, calling for frank and fair discussion. It is social and economic, and has no proper place in partisan politics. There are various viewpoints. If we were to pass only upon questions relating to international right, comity or friendship, it is difficult to perceive why the United States should permit to locate here the citizens of many different countries, which might be mentioned, and who have been allowed to immigrate without restriction as to numbers, and at the same time deny the right to others simply on account of their race or color. It is possible that if comparisons as to intelligence and general merit were to be made between those who are permitted to immigrate to the United States and those who are denied that privilege, the advantage would be found to be in favor of the latter. If we were deciding the inquiry as to pecuniary profit to this country to be derived from the largest production and further development of enterprise, then in that case, unquestionably, all restrictions concerning immigration, based on color or race, should be removed. But if the paramount reason for limitations is found in a just and reasonable claim that to admit them would be to encourage, and indeed make certain, the residence here of an overwhelming multitude of certain foreigners with resulting effects that would be inimical to the best interests of the whole or major part of the American people, then there might be a reasonable restriction as to numbers, determined by our domestic laws applicable to all nationalities. Doubtless all nations, through their duly constituted representatives, would agree to this. It would seem to be appropriate for the League of Nations, when completed and adopted, to pass upon these matters by unanimous vote, without unnecessary delay, after a full hearing upon the merits, taking into account all the circumstances and conditions which have a bearing.

Henceforth there should be maintained in practice the principle of international co-operation as distinguished from hostility, or selfish, secret isolation. Fair, honest, friendly, and persistent competition between nations is desirable and necessary to the highest progress and prosperity, but mean, tricky, overbearing and destructive competition is unwholesome, unhealthful and disadvantageous to all who are affected. In prac-

tice the Peace Treaties and League of Nations as finally established should be accepted by every one. As remarked by the President, its full value depends upon the disposition and effort of the people in this regard. If, in good faith, individuals do their respective parts, the League will be an instrument for the preservation of peace and tranquillity. In economic matters there should be demonstrated a desire to live and to let live, to assist and encourage others, to bear in mind the rights of every one, to maintain on the heights of progress the emblem of justice bearing the motto: "Might depends upon Right."

And now, having barely suggested what it is believed will be the temper of the people of the United States towards those of other lands, it is appropriate to discuss questions especially economic and applicable to our own domestic affairs. It may be remarked that, as a separate nation we did not suffer pecuniary loss and damage to the extent inflicted upon others; nor were there destroyed or maimed as many persons, though the number of brave and fine men who were killed in battle, or who died from disease or accident, or were seriously crippled, is appalling; and, sad to say, there were included a considerable number of splendid women. The names of all these are indelibly placed on the lists of glory, and their deeds will be remembered by a grateful people.

Without any intention on our part, this country, at the end of a horrible and destructive war, was left richer than it was at the commencement. Our wealth, in money and other property, our income, our productive resources, our population, our advantages, our prospects and our opportunities were augmented. We do not boast of this situation; nor are we called upon to deplore it. We have become what we are in the natural course of events. We must beware of the dangers of wealth, but we are entitled to its blessings and benefits, provided we do not fail to appreciate the obligations which are incident. What we see in this respect others of foreign lands perceive at a distance with even clearer vision. The man who supposes he deceives others generally deceives only himself; the same is true of nations.

The inhabitants of other lands are looking towards us with various emotions; some with envy or jealousy, some with distrust, perhaps some with bitterness, and some with covetousness;

but, it is believed, the large majority with friendliness, confidence and hope. However this may be, when it comes to economic considerations there is little doubt that the peoples of every country are at present endeavoring to ascertain how they can most readily improve their pecuniary standing by reconstruction and readjustment; to secure their full share, or more, of the wealth of the world; and foreigners are gazing upon this country as the most fertile field of adventure and exploitation. They will carry their endeavor into the markets of non-producing countries. By every known plan of operation, producers in Great Britain, France, Germany and other lands will seek to control or excel in the overseas trade. Long before the war was ended committees were formed and studies commenced by them with the idea of entering a post-war commercial strife for the world's business. These committees have personally, or through representatives, visited and for months remained within the limits of other countries making examination of properties, manufactories, terminals and transportation facilities, learning the various situations, and making reports on the same. They have been preparing for the most stubborn contest in economic warfare. Evidences of this disposition and intention have been seen on every hand. Besides this, the men occupying high official positions abroad are talking of these matters, lending encouragement and making promises of assistance by governmental action or otherwise. The credit of different governments will be furnished to private enterprise and management. It is reported that attempts have already been made by individuals, on their own account, to secure control of some of the most valuable and necessary raw products located in foreign lands, and the scheme will no doubt embrace the most desirable seaports for loading and delivery, and also the most advantageous coaling stations. Considerable success has already resulted. Arrangements, by contract or otherwise, have been or will be made for obtaining preference as to time and terms in the loading and unloading of goods, and also in the sale of materials and the obtaining of supplies. In short, everything practicable within the limits of law and opportunity will be done by foreign governments and their merchants to extend trade and to promote their own financial interests, even to the extent of proceeding within the natural

spheres of others. The contest for commercial position and progress will be fiercer than ever before, with the difference, it is hoped, that there will hereafter be an international tribunal which will exercise supervision over the conduct of individual nations and will restrict all of them within the limits of law, reason, propriety and justice. Heretofore, wars have generally resulted from economic rivalries; from the struggle for commercial supremacy; and the late wars, in the opinion of many of us, were no exception.

The attitude of other nations and their alertness to reach the largest success in the race for economic position is not attacked or complained of. It is their right and their national duty. The fullest opportunity to every one to succeed by every lawful means within the confines of moral principles and in consonance with the rules and regulations of the League of Nations, is what we advocate. Moreover, the vigor and vitality of trade all over the world is what is needed for the greatest universal prosperity. As already observed, if one is properly enriched others will be benefited. Surely from the viewpoint of this country we wish to see others prosperous and progressive.

In justice to ourselves, we must be diligent and aggressive. We must conserve our strength and our resources. We must view the world situation from the point of experience, caution and wisdom. We should profit by the deliberations, discussions and conclusions of others. As of vital consequence there should be the most consistent and intense spirit of co-operation between all our people, between capital and labor, employers and employees, between the state and private interests, between the various groups of individuals or collection of individuals, between producers and consumers, between professionals and non-professionals. Good-natured rivalry, sharp competition, aggressive effort for legitimate success, faithful administration and observance of the laws, loyalty to country—all these must be encouraged and required; and everything that destroys or obstructs or interferes with legitimate enterprise, or limits prosperity, or that tends to minimize the motive for attempting to accelerate and sustain orderly progress in business, should be discouraged. This country cannot afford to restrict opportunity to utilize all its resources for increasing its wealth or of maintaining its

financial, commercial and industrial position. Economic progress and success are a source of protection and peace, and a bulwark against outside unjustifiable attack of any kind. It is the basis for happiness and contentment.

As a guaranty of the fullest reasonable economic success, including domestic and export business, we must have a merchant marine equal in every particular to the best, with all advantages and no disadvantages in comparison with others, unhampered by laws, rules or regulations which might interfere with practical and successful business operation. We must be prepared to deliver the surplus of everything we produce at the doors of non-producing countries in packages and on terms satisfactory to those who desire to purchase. Our merchant ships must never again be compelled to haul down the American flag, or to occupy an inferior position in the international struggle for economic excellence and advancement. Americans, if given an equal chance with all others, will furnish business to comfortably support a merchant marine surpassed by none. If the League of Nations shall remain in effective force, it is hoped a large navy for the enforcement of legitimate civil rights may not be necessary; but, still, the United States should maintain a navy of sufficient strength to protect her commerce in every part of the world in times of exigency. Heretofore it has not always been absolutely independent and safe, notwithstanding what may have been said or written to the contrary. Our merchant marine and our navy should be, by comparison with others, in proportion to the volume of our part in the world's business affairs. Besides, an adequate navy and auxiliary merchant marine will be needed in order to properly perform our share of duty in preserving the principles and executing the obligations prescribed by the constitution and rules of the League of Nations.

The labor question at present is of commanding interest, first because labor is essential to economic growth and virility, and secondly because it is persistently sought by self-appointed leaders to enlist the sympathy and support of workmen in agitation for the substitution of the rule of force for the rule of law and reason. It is commonly designated as Bolshevism. These agitators will not succeed in the United States. I have heretofore spoken on this subject and will not repeat. However, it

may be observed that the antidote for this poison is plenty of work at reasonable rates of compensation when compared with the cost of living; healthful, safe and agreeable working conditions; opportunity for workmen to advance in positions according to merit; and a chance to invest their savings in the business with which they are connected. The employers must not and will not give the employees good ground for complaint, and intelligent public sentiment will exercise a controlling influence in preventing a return to barbarism. Employers and employees are under equal responsibility to the general public, of which they are an important part, to assist in maintaining industrial peace and prosperity.

The problem of readjustment is perhaps of the first moment. There are many things out of proper alignment. For instance, the cost of living, within a comparatively short time, has more than doubled, while the fixed salaries of life positions have remained stationary. Incomes, perhaps inherited or provided by investment in long time, safe 5 per cent bonds, are not increased, but are, in fact, reduced by one-half, for their purchasing power is thus decreased. This is essentially wrong and must be corrected whenever and however possible. With respect to the salaries to which allusion has been made, they can and ought promptly to be increased. Incomes limited by rates of interest are more difficult of readjustment. Prices of commodities are too large in many cases; and the average, designated general level, is too high. They are not regular and are not relative. Some have advanced 50 per cent, others 200 per cent. Many small articles, bringing immense sums in the aggregate, have been advanced beyond all reason because the facts escape exposure and public criticism on account of the smallness of the items. The middle-man is charged perhaps 50 per cent advance, adds this increase to his previous selling price, and then insists upon and secures 100 per cent advance on the whole. Besides, in many cases, he cuts in two the previous package or portion. This is not assumption, it is an ordinary, every day occurrence. The seller of spirits of camphor, cologne or alcohol, pours into the bottle 50 or 75 per cent of water and then doubles the selling price of the whole quantity. All of us have noticed during the last few years that the liquids used as lotions, such as alcohol,

cologne, etc., seem to be very hard. This is because of the quantity of lime in the water used. These examples appear insignificant, but they are illustrative and represent conditions which involve millions. The irregularities can be overcome by law if properly and systematically enforced; and they would, in part at least, be cured by increases in the sale in this country of a better quality of goods manufactured in foreign places.

The term "level of prices" has been used to denote those which obtained prior to the war. Though frequently used, it is not accurate as applied to the period intervening between then and the present. There has been no level, but rather a changing, irregular range of prices. The producer of an article of food increases the selling price to a purchaser who is a manufacturer of an article of clothing; the latter increases his price to the producer who has fuel for sale; this one increases his selling price to the builder of a dwelling house; then an increase by the owner is passed on to the tenant, who is a laboring man working for the seller of food, the point where the illustration commenced; the workman then increases his rates for compensation accordingly. On and on all have been going, some at a faster pace than others, and, of course, there results confusion, inequalities, unreasonable prices and economic disturbances. A scientific readjustment should be attempted. We ought to commence somewhere to go back and downward in this whirl of augmentation by lowering one price after another with the intention of getting back to a level founded on a just and relative basis. How could it be accomplished?

The Industrial Board appointed by the Department of Commerce, made an attempt to do this, but failed because there were differences of opinion, and perhaps some modification of opinion, by members of the government official family. It was proposed by the government to invite the leaders of various lines of industry to co-operate in making reductions of selling prices and to reform them on a basis which should be equitable as between producers and as between them and consumers. One of the industries, at least, accepted such an invitation promptly and agreed upon substantial decreases in selling prices and evinced a willingness to co-operate in perfecting and carrying out the general plan. The immediate effect upon business generally

was good and the outlook appeared to be promising when the activities of the Board were interrupted and the members resigned. No better plan as yet has been proposed.

If and when we adopt the methods of some of the European countries in regard to quality and condition of articles sold for consumption, and require rigid public inspection, together with reasonable and systematic control of the necessities of life, we shall witness great improvement in health and material reductions in the cost of living. We are making some effort in this direction.

Sound economy admittedly is proper and necessary at this particular time. There should be no actual waste. Other countries will economize, some to the point of unhealthful privation. We need not and should not go so far. Our government expenditures made during the war amounted to millions upon millions. The annual interest charges will be enormous. To provide these amounts and the extraordinary increases in government expenses, burdensome taxes will be imposed. They are now very large and are increasing. It is pertinent to say that strict economy should be practiced by our government. Every department should pay particular attention to this subject, and the chief should personally give instructions in detail upon the subject and see that they are carried out. Unnecessary rules of practice, resulting in duplications of work, inconsequential and ineffective forms should be eliminated. Government affairs ought always to be managed with the same efficiency and economy that the best governed private interests practice. A part of the money that is being spent for investigations, compilations and, in some instances, prosecutions, might better be expended towards the development of trade in South America; and some of the money paid for high fees to special attorneys and their assistants ought to be used in payment of increased salaries to regular officials. It is not easy to draw the line between waste and proper expenditure. The liberal spending of money by individuals who can afford it, for distribution among those who will properly conserve or use it, is not waste nor should be objected to; but if one eats only half of the meal served and throws into the fire or the sewer the other half it is waste. If there is an unnecessary outlay for food or clothing or anything

else, by reason of miscalculation or otherwise, the surplus should, in some way, be properly utilized. One may be extravagant if one can afford it and is not profligate, but none of us is excusable for being wasteful, especially at this time. We might readjust ourselves to changed conditions even more than during the war. Many denied themselves not only luxuries, but comforts, during the last few years and donated an equivalent for war purposes. This was highly commendable, and it is to be hoped we shall not return to the ante-war wasteful practices, for the country will need, during the transitional period, long or short, all that properly may be conserved. History relates that heretofore more than one nation has been overcome or fallen into decay by reason of extravagance and waste.

On the assumption that all the natural resources and facilities of the United States, in peace times as well as during war conditions, ought to be used to the best advantage, it is believed a fundamental question to be discussed, considered and decided at present, is the treatment of accumulated capital, or wealth in the hands of private individuals or private corporations. The experience of the eighteen months preceding and ending November 11, 1918, should be of enlightening value, for the lessons learned by practical demonstration are always superior to untried or unsatisfactory theories.

Probably it will be generally conceded that during the war, when the greatest production of war material was demanded by our government for the military necessities of itself and associates in the war, the large and integrated concerns with highly perfected organizations and abundance of working capital, saved the situation. Except for them such necessities could not have been adequately supplied. What would have happened without their facilities no one could, with a feeling of certainty, express an opinion. The representatives of our government in every department connected with the war, as well as those who represented our associates abroad, were constantly calling for more and more war materials, and at the same time expressing opinions of doubt and alarm concerning failure to provide them. However, with no harmful interruption or delay, all demands were met; and knowledge of this fact no doubt had a decided influence upon the German mind when the truth was ascertained.

But now the question occupying the thoughts of men, to a large degree, is what, if anything, can properly be done to conserve these means of economic stability and progress when war is not upon us and let us hope, not threatening our future safety. The general public, including labor, which receives 85 to 90 per cent of the cost of production, is vitally interested in this subject.

It is useful, while discussing a problem in contemplation of future action or inaction, to illustrate by negative reference what ought not to be done.

Government, state or municipal control or management, is frequently suggested and stubbornly urged by public speakers and publicists. The reasons given ordinarily relate to the protection of the public against imposition or inefficiency, which is desirable. Here again experience, especially during the war, is illuminating. The government took over the possession and management of certain *quasi* public concerns, and, with the assistance of a large part of the previously formed organizations, realized some success in operation; but, as a total result, the experiment was a failure. Every day that passes furnishes evidence to justify this assertion. The properties and businesses taken over have been or will be returned to the owners for the real reason, if not admitted, that the undertakings were too big and complicated for new and inexperienced chiefs to manage. What the results of this experiment will be as to the future values of the properties no one can, with accuracy, predict. It cannot be entirely satisfactory to the owners or, for some years at least, to the general public.

There are reasons why governmental management will not be successful. To reach the highest efficiency in the development and operation of any enterprise there must be personal, pecuniary incentive to succeed. There must be individual attention, thought and decision which ponders over the difficult and complicated problems by day and night and then solves them with a view of securing personal benefits for self or principals represented. Whatever is every one's business is no one's business—a common expression, but applicable. There must be a motive for economy in administration; for perfecting and maintaining a complete organization, skilled, honest and faithful; for such treatment of employees as will tend to secure loyalty and efficiency in service; for everything that makes for success; and for

discarding or rejecting whatever is calculated to impede, obstruct, or minimize it. This means, in great measure, pecuniary profit to those who assume the risks of business, though the assertion is ventured that the private individual in general charge of a large concern, if right minded, is as much interested in and as faithful and loyal to the public welfare as a duly elected public official. Again, there is always danger that partisan politics, if brought into the control or mangement of business, will have an adverse effect upon the results.

During the war the government seriously contemplated taking over the management of additional large business lines, but after full investigation, discussion and consideration, concluded it would be unwise, although there were persistent and able advocates who favored the proposed action. The results fully justified the determination arrived at. It was believed by many that the government assumed the management of many departments of business activity other than those actually included in the government list. This was because there was co-operation between governmental agencies, such as the War Industries Board, and aggregations of private interests, represented by small committees, whereby voluntary arrangement was made for allocations of burdens or distributions of products. The control of operations, from the raw products to the finished materials was continued in the hands of the owners. There was clearly demonstrated during the war the value and practical benefit of private management as compared with public management. If it be said that government conduct of business has sometimes been successful the answer is that the same business in the hands of private, responsible individuals, with capital and success at stake, would have resulted more favorably.

The ideal plan merely for the extension of enterprise, development of resources and the certainty of greatest production, with resulting increases to the public treasuries through taxation, assessment of dues, etc., and a corresponding benefit to the large numbers of workmen, would be to leave the matter entirely and independently in the hands of the private individuals who furnish the necessary capital and who would be inspired by the desire to reap pecuniary advantages. However, it is a patent fact that the ability of capital to accomplish desirable results

also involves opportunity to do harm; that uncontrolled concentration of capital, with unbridled license in operations, may be injurious to the welfare of others, including the general public. All fair-minded, well-intentioned men, will admit that the public interests must always be of primary importance; that there should be a curb upon the cupidity of human nature. Of course, from every standpoint, including selfish desire to continuously and permanently prosper, as well as the instinct to secure and retain the respect and confidence of the community, every intelligent person should be prompted to use capital in such manner as to be of benefit to all others and of no intentional harm to any one; but, unfortunately, such is not the case. The human element interferes. Greed and avarice have a powerful influence upon the mind, and the concentrated power of the public is often necessary to protect one against oneself.

In view and by reason of these conceded facts and considerations there has been attempted to establish by law a preventive against wrong and, in numerous instances it has been invoked. However, it provides for the punishment of offenders and for the destruction in whole or in part of the property and business involved. This seems remarkable and irrational, especially after the experiences of the last few years, and on the eve of the greatest struggle for economic progress the world has ever witnessed. If the legal department of the government, basing action on its interpretation of the law, had been upheld in its contention, unlimited by the rule of reason, as applied by the courts to the industries of this great country, property and business in an alarming proportion would have been destroyed and its benefits to the general population eliminated in the effort to prevent future harmful practices.

Proceeding on the assumption that large capital is desirable and necessary for the safety and legitimate progress of the nation, and yet that it must be controlled against possible harm, we are confronted with what has appeared to many to be a difficult problem. It should be met and solved now if we are going to conserve our vitality and strength; if we are not to weaken or neutralize it at this juncture in world affairs when we are called upon to pay enormous debts, to finance our own necessities and to assist our neighbors across the seas to maintain a state of preparedness

against possible, though not probable, future wanton attacks, and to aid in maintaining the peace of the world to the extent of using force, if and when necessary, all of which will require billions of money. Can we hold our position, and are we to be included in clear thinking, wisely concluding peoples? Shall we profit by the experience of the past and by the example of others?

Is there any solution of these problems? I am talking to men who are more competent than I to answer. Still, the general proposition is ventured that whenever it is practicable and effective, resort should be made to the prevention of threatened or possible harm, without destroying the property or business in question, and which can, if preserved, be of substantial benefit to the community and to the nation. This principle has sometimes been invoked by the courts so far as it was believed the provisions of the law permitted. Why not have the law so framed and administered as to allow the courts to cover the whole subject by injunction, rather than by the destruction of property or business? If capital is proceeding or threatens to proceed improperly, it can be restrained by injunction and the order enforced in the regular way. A court of equity should have, if necessary, enlarged powers of preventive remedy, unlimited by statutory provisions. If there is to be punishment inflicted it should be upon the individuals who are reprehensible, and not upon the owners, as stockholders or otherwise, of the properties involved, who are in no respect responsible for misconduct.

If it be said that preventive measures by injunction are too late after there has been established unreasonable concentration of capital, which naturally and necessarily includes the power to do harm, or that in the administration of affairs pertaining to organization or management there is involved too much detail or complication for practical hearing and determination by a court, then it might be answered that there should be no objection to the whole matter of previous assemblage of capital by corporations, form of organization, or management of affairs being subjected to the consideration and decision of a competent non-partisan tribunal, consisting of men selected for their peculiar qualification defined by the creative law, having adequate jurisdiction and powers, subject, however, to appeal and final

determination by a Federal Court concerning certain defined and vital questions pertaining to monopoly and restraint of trade. A law for federal incorporation or license could embody provisions for the control or regulation suggested. This might satisfactorily solve the problems relating to concentrated wealth in the control of corporations.

It is to be remarked that with reference to this whole subject and all other matters mentioned for future determination, full publicity and knowledge of all the facts and conditions in detail, will furnish the most effective remedy for defects, inconsistencies or wrongs.

These matters are not political. They are of universal interest. On their proper disposition depends the greatest legitimate advancement in economic affairs. Those in general charge of large business units are quite willing to meet these questions in a spirit of fairness, justice and loyalty to the public. The present conditions are not satisfactory. During the war, when greater production, larger and more costly extensions and more rapid deliveries were required, it was deemed by the government proper and necessary to relax or at least liberally interpret the supposed inhibitions of existing laws and rules in order to meet the military demands. The departments of the government in control of war matters were then more potential than the Department of Justice, whose hands were partially bound by statutory provisions. If this governmental attitude was appropriate and necessary during the war the same is true, if to a less extent, in times of peace, for the object to be obtained in both cases is the largest production and development.

Prudent, open-minded and thoughtful persons endeavor to conceive and consider both or all sides of every question presented, to be fair in conclusion and to be frank in expression if called upon to give utterance. We must admit the war, with all its horrors and results, has abnormalized the minds of men throughout the earth. The period in many aspects is serious, in some particulars it is critical. There are difficulties, perhaps dangers, in the pathway of progress. Vision is liable to be twisted and decision illogical and unjust. Selfishness, cupidity and hate improperly influence the action of men even beyond their own perception. Various factions in their antagonisms go to ex-

tremes that are essentially wrong. The worst of all movements of the present grow out of propaganda and agitation calculated to obtain something for nothing, to forcibly take from those who have been successful the property which has been honestly acquired and to distribute the same amongst others less prosperous. The idea is not confined to any individual, community, class or race, though it may be exaggerated more in some than in others. It is supported on the theory that might is right; that power is supreme.

But we have reason to hope that, in this country at least, all classes will be treated impartially and justly; that all laws will be upheld and wisely administered; that person and property will be protected; that co-operation, to the full limit of propriety, will be adopted and practiced; that there will be established and maintained a basis for continuing international peace, a practical method of sustaining international banking credits and facilities, friendly connections which will secure the rights and interests of all countries to the undue prejudice of none, open and uninterrupted avenues of commerce throughout the world, a consistent and persistent policy of reconstruction and readjustment which shall readily restore a normal and proper relationship concerning the pecuniary affairs of the people of this country, a spirit of sincere co-operation between labor and capital, calculated to preserve the rights of each, faithful effort on the part of both to render full justice to the general public, and a fixed national program which will encourage full development and conservation of the economic strength of the United States. Capital and labor both will be fully employed on a basis that will be fair to each and also to all others, and on a scale of returns that will provide an incentive for investment, development and exertion, and this will insure the largest production at lowest reasonable cost. This will tend to decrease living expenses, increase the comfort and contentment of the people and add to the riches of the nation, which relies on the prosperity of its citizens for the standing and influence among nations to which it is entitled. There will be no necessity, time or desire on the part of the vast majority for listening to the vicious doctrines of self-appointed agitators. The extension of education, art, science and moral growth will follow in due proportion. We shall set a good

example to all the world. Anarchy and brutality will give way to reason and justice. This is not the worst period of our history; it is the best, for it looks forward to a future that is bright and glorious if we but rise to the heights of practical advantage. In briefing the situation, in forming an opinion that shall be sound and in conducting the case before the bar of public sentiment the members of the American Bar Association have great responsibility.

THE NEW CONSTITUTION OF THE UNITED STATES.

BY

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OF TEXAS.

The constitution of a country is the body of rules, principles and conventions in accordance with which the framework of the government is established, and laws are habitually and normally adopted and administered. The Constitution of the United States was primarily assumed to be the written instrument so-called, and that instrument is still not without importance as a part of the Constitution.

The United States was brought into being by the adoption of this written constitution. Whether the power was directly conferred by the people or by the state governments already established, this instrument gave all of the power with which the new government was primarily invested. As originally drawn, it provided the governmental framework, specifically stated the powers to be exercised by the United States, and placed some limitation upon the states.

In the days of our ancestors, superior statesmanship required the urging of objections to anything proposed, and any plan formulated necessitated interpretative reservations and corrective amendments—hence the substantially contemporaneous and comparatively unimportant first ten amendments.

The praise which has sometimes been bestowed upon the original constitution must be regarded as extravagant. A statement to the effect that it was the greatest instrument prepared by human hands at one time, overlooks the fact that it was in preparation for centuries, and ignores the defects which its use has developed. It was useful in that it verbally reconciled conflicting views of government, and convinced dissatisfied states that whatever ills it might bring were less dangerous than the divisions with which the states were threatened. It was more than useful in that it held together peoples whose conditions were

different and whose interests were divergent, until a national spirit could be developed and patriotism born.

That it was a makeshift and compromise; that it ignored issues it could not settle; that its construction has engaged the continuous and acrimonious attention of statesmen and other law makers, lawyers and courts for nearly a century and a half, evidence its very human origin.

But it is sufficient answer to all criticism that it has bound the states of America together and has rendered impossible, on a large part of the continent, the discordant and disastrous conditions which have existed for centuries in Europe; that it has given to these American states that degree of liberty and peace for which all mankind has a present privilege to hope.

That the Constitution now existing is different from that which was primarily adopted (without reference to the formal amendments) is a matter to be stated, not argued.

Some writers of that which is called history, and many judicial and other commentators on the Constitution adopt a statement by Storey to the effect that there was always some character of combination or union between the several colonies. Those who were as solicitous for the truth as to establish a predetermined proposition, followed this conclusion of fact by the facts which he recited which disproved the conclusion.

The original states were, before the revolution, all colonies—under diverse conditions—of Great Britain, but there was no other legal tie between them. They had a common national dependency, as have Canada and Australia. They had a common racial origin, as have the Hebrews of New York and Mesopotamia. They had a common danger, as have England and France. They were upon the same continent, as are Mexico and Texas. But, prior to the confederation for war against Great Britain, all efforts at combination or united action had failed. Union had never been attempted.

When the single common tie was broken, they were absolutely free from each other and all other governments, independent of each other and all governments, and sovereign in every element of sovereignty. The only external connection between them was a loosely framed and entirely inefficient confederation which, acting under defined delegated powers and supported by contributions,

reluctantly offered and frequently withheld, made no pretense to being a separate government.

When independence was declared, the fact of independence already existed. Loyal verbal protests developed into armed resistance for the protection of constitutional rights, into renunciation of allegiance, and finally into actual independence supported by successful arms. Before the declaration by representatives of all the states, declarations of independence were made in some of the states, and in each of them a government was actually functioning that recognized no allegiance to the English king, the first of the rulers of Teutonic blood who fatally mistook the spirit of America.

It was provided that the Constitution should become effective when adopted by nine states, and the government was established and began its actual operations with eleven states only. Rhode Island and North Carolina for a time had no character of connection with each other, nor with Great Britain, against whom they had successfully rebelled, nor with the confederacy which had become defunct, nor with the new government which they had not joined.

These facts are developed to show the character of the government as primarily organized. It was more than a confederacy. It was a combination of free and independent states for the common accomplishment of definite purposes definitely named. It involved the exercise by the agency thus created of powers which appertained to a sovereignty and the agency necessarily secured these powers from and at the expense of the states. To this necessary extent the state sovereignty was impaired, but otherwise it continued in full force. The language of the instrument, the history of the times, confirm these statements. The adoption of the constitution would not have been possible if any other conception had obtained.

Primarily, the United States was a legal abstraction. A new nation had not been born by the mere change from a loose confederation which had made an effort to provide for "the common defense and general welfare," but had failed, to a new legal entity formed for these purposes but which had never even had an opportunity to try to accomplish the hoped for results.

The powers conferred upon the new government were:

(1) To maintain relations with other nations:

(a) by treaty;

(b) by the use of an army and navy and letters of marque and reprisal.

(2) To regulate foreign and interstate commerce;

(3) To furnish postal facilities;

(4) To grant patents;

(5) To provide a fiscal and monetary system;

(6) To punish crimes on the high seas and affecting the delegated powers;

(7) To tax "for the common defense and general welfare."

The contention that the last-named grant conferred the right to tax for any purpose conceived to be for the "general welfare," disregards the ordinary rules of construction, makes unnecessary the specific delegations and renders foolish the tenth amendment.

The states continued with all the power theretofore had except those specifically delegated to the general government and those specifically denied the states. They had all the powers of completely independent sovereignties except:

(1) The right to deal with other nations and states;

(2) The right to regulate interstate commerce in conflict with power exercised thereover by Congress;

(3) The right to conduct post-offices or grant patents;

(4) The right to pass any bill of attainder, *ex post facto* law, or law violating the obligation of contracts, or to coin money or make anything but gold and silver legal tender.

Immediately after the establishment of the government, questions arose as to the construction or interpretation of the Constitution. It became apparent that there were activities with reference to which powers had not been conferred in which the general government could more advantageously engage than particular states, and the process of acquiring power by implication and interpretation was not delayed.

Schools of political thought arose based upon the phraseology of the Constitution, or being in existence, found in the words of the Constitution effective material for the development of their views of government. The dominant note of the resulting debates

was not the public policy involved, but what had been declared the public policy by the Constitution. Extreme erudition with reference to the document and its history was incited, but consideration of those human principles, it was the purpose of the Constitution to develop and subserve was discouraged. Progress of political thought was retarded, but compensation was given in the conserving force against radical action.

The most clearly defined lines of political thought or of constitutional interpretation was between those called the "strict constructionists and those who found on the Constitution a spirit, the verbal expression of which had been neglected. There were, in fact, no strict constructionists—for such a construction would have rendered impossible much that has been done in the development of the nation with the concurrence of all shades of political opinion. To illustrate: The constitutionality of the Louisiana purchase was doubted by Jefferson, who effected it and could logically have been questioned by the very latitudinous students of that instrument, but the acquisition has reserved the commendations of all parties.

Every denial of power in the federal government was an assertion of states rights, and since the invocation of the strict rules of construction was largely to maintain the indubitable right of every state to determine for itself whether slavery should subsist within its territory and whether the property rights in the slaves should be protected, rules of constitutional construction became inextricably confused with moral and political questions.

Slavery had been an institution of all time; the South's economic system was based upon it; it was protected by the constitution. Few of the states, possibly none of them, would have given up elements of sovereignty in the absence of these protective clauses. There was a primary failure to recognize the growing detestation, now universal, of the institution, and when the conflict arose the slave states stood without other support than that given by the unequivocal terms of the Constitution.

From a purely legal standpoint, it is not difficult to maintain that the failure of some of the parties to a contract to carry out its terms in good faith, gives to the others of the parties the right to withdraw from the contract. The application of this principle to the effort of some of the states to secede assumes that

the ordinary rules of law may be invoked when contracts of the character involved in the formation of a government have been breached.

The usual answer to the argument for the right of secession has depended rather upon a perversion of history than an appeal to the truth of history which would have furnished a better answer.

While the mere adoption of an instrument could not make a nation, the material was at hand, and, even in the years of discord between the sections, the heart of a nation began to beat.

In the days that immediately followed the adoption of the Constitution, the new government had neither the love of its people nor the respect of other peoples. It had accomplished nothing. No man had sacrificed anything for it. The benefits received were unimportant. There was no patriotism. Allegiance was to the state,—love and pride for the state. The new government showed little more virility than the abandoned confederacy.

In the war of 1812, the operations of the little navy, drawn principally from New England, and one battle fought by the men of the South, are all that we may speak of with pride. There was evidence of cowardice of some of the American troops; the act of a historian in not merely suppressing the fact, but in destroying the proof, was a form of dishonesty not difficult to condone. As late as 1814, threats of disruption of the union coming from the fine old Commonwealth of Massachusetts, were not regarded as treasonable.

But a nation was in the making, and in 1833, the threat of South Carolina to nullify an Act of Congress could be met by the argument of force. The war with Mexico was a great enterprise in which men from all sections participated. It rounded out the possessions of the United States, and the result became a source of pride even in those states to whose public men vision of America's greatness was denied. Primarily, whatever feeling of patriotism existed was based rather upon the state than the union; but in the meantime new states had been formed, the sole author of whose being was the United States.

The war between the states was fought. It was only after a half century that one may consider calmly its awful years of

slaughter and realize that it was not without incidental benefits. At least, it was a great educator—at least, it gave to each section a new knowledge of the other sections—at least, it made them forget little things—at least, it brought realization that a great power had come into being in America. If the process of making a new nation had not theretofore been finished, it was completed by the mingling of blood on well-fought battle fields.

I think the process had theretofore been completed. The people of the South suffered sorely during the years of the conflict. They waged war for at least three years after reaching a greater degree of exhaustion than existed in Germany when she begged for peace. But the war engendered no permanent bitterness, and while the indefensibly bad government of the reconstruction period had not been forgotten, the re-establishment of rule by the people of these states restored complete loyalty of the union and a new patriotism was born, or an old revived, that has grown into an impassioned intensity.

My life covers the period from the close of the war, and I have spent all of my days with the soldiers of the Confederacy and their descendants, but I have never heard words that approximated in disloyalty the treasonable utterances in the halls of Congress during the days of our recent great danger.

My thesis then is that while from a verbal legal standpoint the argument for secession is extremely difficult to answer, the United States had already, when secession was determined upon, become a nation, and that there are implied negations in every national constitution against the disintegration of the state and the destruction of the government. There was the right on both sides which all the original states had exercised, the right of revolution, but there was no constitutional right on the one side to ignore the terms of the Constitution, nor on the other to seek redress outside its terms. But no verbal argument against secession can be as strong as that recently made by history. American unity was essential to civilization and liberty.

That which created a new nation, whether the war or that which went before it, abrogated for practical purposes any sovereignty in the state, and furnished the predominating feature of the new constitution.

The gradual destruction of the importance of the state, even as an administrative unit, was inevitable under the terms of the Constitution.

There were three delegations of power, by the progressive exercise of which the general government has absorbed many of the powers which it was the purpose primarily to leave in the states:

1st. The treaty-making power;

2d. The power to regulate foreign and interstate commerce;

3d. The power to tax.

The treaty-making power is conferred upon the President and Senate, but it is substantially under the control of Congress, the inference from the decisions of the Supreme Court being that any matter which may be the subject of a treaty may be the subject of legislation. To illustrate: a majority of the House and of the Senate may, with the concurrence of the President, make the United States a member of the League of Nations. There are no defined limits to the treaty-making power, and its use to regulate alien land holdings within a state would illustrate its capacity for invasion of rights assumed to be in the states. Actual use of the power has been made in the protection of migratory birds.

The extent of the power to regulate interstate commerce has not been defined, nor will it be. It can be made to affect all the relations of each of the people of each of the states with all the people of all the other states. Since it is held to include the going across the state line for sexually immoral but non-commercial purposes, and to include the intent, partially consummated, to ship liquor withdrawn from commerce across the state line, it would seem that the connection between the matter legislated upon and interstate commerce may be very limited and very remote. The power to regulate actual interstate commerce is and was intended to be great, but the fact that intrastate and interstate commerce would become so intermingled as to constitute a single indivisible commerce could not be foreseen. Through this power, the entire commerce of the country has virtually come under the control of Congress. Immediately in sight are federal incorporation of railroads, federal regulation of their securities and federal fixing of interstate and intrastate rates.

The limitations which were primarily imposed upon taxation have been removed. The adoption of the 16th amendment places the wealth of the country so absolutely under the dominion of Congress as to render nugatory the provisions against confiscation and the taking of property by the general government without compensation. The use of taxation to accomplish ends not primarily assumed to be within the domain of the United States, has progressed from taxation for revenue with incidental protection, by the action of Democrats, to protection without reference to revenue, by action of the Republican, and finally to taxation for the accomplishment of any desired end for which no specific authority can be found, by the action of any party in power. The determination of the subjects and the manner of taxation is in the legislature. Its determinations are not subject to review. The courts inquiring into the constitutionality of the act may merely read the law. They may not question the legislature's good faith. They may know that the legislation cannot produce and was not intended to produce revenue, but they do not judicially so know, and they cannot judicially so learn. When the child labor law was, by one of the occasional manifestations of judicial reluctancy, declared unconstitutional as not within the interstate commerce delegation of power, another act was passed taxing products of child labor. If it accomplishes the ends intended, it will produce no revenue. But it is not seen how adherence to former opinions may be effected, and even general principles of law followed, without holding the new law constitutional.

The abrasion of the states rights has most usually been accomplished by the passage of acts of doubtful constitutionality upheld by the courts because not undoubtedly unconstitutional.

The fourteenth amendment prohibiting the taking of property without due process of law, furnishes direct opportunity to magnify the federal government by the use of the courts. The amendment is used as a basis for numberless attacks on state laws, city ordinances and the actions of administrative boards. The federal courts are expected to be the general corrective agency for the state, executive, judicial and legislative departments. They have even been called upon to substitute their judgment for that of the state legislature in the matter of the necessity and desirability of state criminal statutes.

The first direct conferring of police power upon the general government to be exercised in territory subject to state laws is the 18th amendment, prohibiting liquor for beverage purposes. It would be difficult to conceive a further departure from the original constitutional scheme. It evidences, however, the fact that the people of the states, including those formerly insistent upon states rights, will not permit any cherished views of their ancestors to interfere with the use of what is conceived to be the best machinery for the accomplishment of an end determined upon as necessary or desirable. Prohibition, though an old policy in some of the states, had little vitality until the virile puritanism of the South found a coadjutor in the economic requirements of the southern states, when historical political thought and traditional personal habits were alike abandoned. On the other hand, the tardy effort by the protestants for personal liberty, and by representatives of the liquor interests, to preserve the spirit of the Constitution is an appeal from a section for the first time solicitous for the rights of the states.

The federal government has been further enlarged by the endless creations of new departments and bureaus whose activities are certainly within the domain of the state, and certainly not delegated to the federal government. These are exercising, in most of the known cases, functions that are vastly beneficial and the people would by no means permit them to be abolished.

Next to the nationalization of the United States and the limitation of the powers of the states as governmental units, the development of direct democracy is the most notable feature of this new constitution. The processes toward democracy are evidenced by:

(1) The removal of restrictions on white male suffrage;

(2) The *de facto* abrogation of the powers of presidential electors;

(3) The abolition of slavery;

(4) The creation of a citizenship of the United States;

(5) The 15th amendment;

(6) The direct election of senators;

(7) The removal of sex limitation on suffrage;

(8) The education and organization of workingmen.

Among the written evidences of our Constitution is the Declaration of Independence. It used a number of standard English constitutional expressions, and reflected somewhat the phraseology of the French Revolution. Among its sonorous pronouncements was that "All men are created free and equal." The postulate has the demerit of most generalizations of being only partially true; and it is partially true, only when its force as a political principle is explained away. Certainly, it meant little to our ancestors. At the time of the declaration, a distinct class directed in most of the states, all social and business and governmental activities, and at the other end of the rapidly descending line, were human beings entirely without recognized political or property rights.

The Constitution was based upon the idea of checks and balances and the removal, as far as practical, of the actual control from the people. The President was to be chosen by a board. the judiciary was to be appointive. The members of one of the bodies in which the legislative power was vested were not to be chosen by the people.

The Constitution left the matter of qualification of voters exclusively to the states and all United States elective officers were elected by voters whose qualifications were prescribed by state laws. Property and educational qualifications were not uncommon and unrestricted male suffrage probably did not exist in any of the states.

The first step towards further democracy was accomplished without an amendment when political parties began to nominate presidential candidates and thereby made the powers of the electoral college nominal. Liberalization of suffrage in most of the states was followed by the adoption of the 13th amendment which abolished slavery, and the 14th, which created a citizenship of the United States as distinguished from that of the state.

The 14th amendment was quickly followed by the 15th. The 14th, in so far as it dealt with suffrage, maintained the policy which had theretofore obtained of leaving to the states the determinations of the qualifications of voters, but reduced representation in Congress in proportion as males of age were excluded from the ballot. The 15th amendment involved the first direct exercise of power over the framework of the state governments.

It prescribed not alone qualifications for electors of federal elective officers, but directly created a new class of voters for the states and their sub-divisions.

The amendment made so radical a change in the character of the general government that doubt could have existed as to its constitutionality even if no question had been raised as to the manner of its adoption. It is recognized, however, as a part of the written constitution.

A fair interpretation of its term, considered in connection with that part of the 14th amendment which dealt with citizenship of the United States, includes a declaration that all the privileges and incidents of American citizenship were to be open to all mankind without reference to "race, color or previous condition of servitude." In so far as the yellow races are concerned, its effect has been destroyed by Congressional action; in so far as the black race was involved, its final effect has been to assure that degree of political influence which would have been accorded without the amendment.

It is to be assumed that the principal purpose of the amendment was the protection of those who had been in slavery. It is not to be assumed that all of its consequences were foreseen. Wisdom cannot sit at the counsel table with prejudice. A very serious and unbiased consideration of the radical policy proposed would doubtless have led to the conclusion that immediate and unrestricted extension of suffrage to millions of persons entirely ignorant of the duties of citizenship could not, under any circumstances, be without evil effect to those enfranchised and those otherwise in any way to be affected. The policy necessarily involved placing a race recruited from barbarous Africa, smeared for a few generations with the gloss of an imitative civilization, enured to slavery, ignorant of the most elementary principles of government, over-enlightened, liberty-loving, defeated, but fearless men of a race accustomed to dominancy. It further, in fact, involved leadership of the newly emancipated race by persons who realized the potentialities for profitable evil which the new conditions presented; who recognized and utilized the possibilities for plunder; who taught corruption and lawlessness to the ignorant people who trusted them; and who made necessary the rally of defeated and disorganized forces that a threatened civilization

be saved. That which might have been used as an incentive to advancement and a reward for merit was conferred under conditions and circumstances that brought harm to the race whose benefit was intended.

The processes by which the government was restored, involved the use primarily of methods good government must condemn. The results are retained by means apparently legal, but certainly hurtful. The resulting racial solidarity brings about absolutely discordant political affiliations. It has produced a bi-partisan party. It prevents proper consideration and determination of public questions. It imposes upon the people from time to time federal officials who are not representative citizens and who prevent the perfect development of the unity of the government and the governed.

In so far as it was the purpose of the 15th amendment to confer political equality upon a totally unprepared people, it has not been effective. The progress made by the race incites the hope that they may become able to assume and properly discharge the duties and responsibilities of a citizenship of which they already have the substantial benefits.

The people of the South do not regret that slavery is no more. They realize that the former slave is an important element of the citizenship. They rejoice at the personal and material progress he has made, and in his contentment and happiness. They appreciate his abundant good qualities and excuse his manifold deficiencies. They are shocked and crazed at occasional reversions to barbarism, permit punishment scarcely less barbarous than the crime, and pay the indirect inevitable and ample penalties of violated law. They feel that the racial distinction God has made cannot be ignored, and deplore the dangerous policy that holds out the promise of a social equality nature will not permit to be realized.

Recent advances in democracy are the election of Senators by a direct vote, and woman's suffrage. The latter has not been formally adopted, but is a part of the new constitution. The women are in position to dictate the election of a President and the Congress. The recognition of woman's interest in public affairs, and of her ability to effectively represent this interest, is the longest step towards democracy that has ever been taken.

In determining the new constitution, organizations not formally connected with the government but materially influencing life and legislation of America cannot be ignored. All the more important political revolutions have resulted from unsatisfactory economic conditions. The industrial development after the Civil War created a slavery that the thirteenth amendment could not affect. The conditions under which the laborers were compelled to live were intolerable. That men in every class should have an opportunity to secure proper food and clothing for themselves and family, the time and ability to maintain them in health, the opportunity for reasonable recreation and improvement, the ability to provide for old age and sickness, is a proposition to which there should be no dissent. Personal freedom and political equality cannot compensate the lack of those necessities of life. The growth of education and intelligence in the partially submerged, and of civic consciousness in those more fortunate has brought recognition of the injustice, the economic waste and the social danger in withholding these demands of the soul and body. Fundamental injustice cannot exist with practical education. The school-house dictates to the legislative hall. By state and federal legislation and other agencies the rights of labor have been recognized and in large part secured.

The initiative in many of these reforms has been in the labor unions. It would not be reasonable to expect that organizations of great power, directed by men of ability representing the grievances of their class, should not some time abuse the power. On the whole, the results have been good, but nevertheless, the unions have compelled consideration of a vitally important question.

Whether it has become a part of the Constitution that legislation may be framed and compelled by organizations other than Congress, is yet to be determined. In view of the character of that which is called the government in Russia, and of dangerous activities in all European countries, the question is neither impertinent or unimportant. The one definite instance in which the power of national legislation was exercised by certain of the labor organizations, is not sufficient to establish that the procedure has become a part of the governmental plan and to be regarded as a part of our Constitution. A second effort, incited

by this success of the railroad trainmen in raising their wages in privately owned corporations by the dictation of the Adamson bill, seems to recall to the law makers that the legislative power is vested in Congress.

That the legitimate requirements of labor shall be accomplished or the burden of an inability to meet them equitably distributed among all classes, is an end to which wise men will work. The economic policy, however, of the country is not for any one class to determine; it must be the solicitous business of every class. That any part of the government be turned over to any agency that does not represent all the people, involves the destruction of liberty and democracy and the substitution of the murderously insane schemes of Lenine and Trotsky.

While the growth of education and practical intelligence has been gratifying, it is not true that intelligence and education are universal. While the development of proper pride and self-reliance has been notable, it is not true that there is an absence of class feeling and jealousy. There are, too, socialists, communionists and anarchists. But the great body of the American people are intelligently content with—or only intelligently discontented with—both the general governmental and the general economic plan.

What is called the capitalistic system is the basis of both. The fundamental idea is individual property rights. A large majority of the American people belong both to the capitalistic and to the laboring class—that is, most of them depend for their income in part upon the accretions from former savings and in part upon their daily toil. The majority of those who have nothing aspire to have something, and will not be content with any scheme which removes incentive, kills initiative and induces a spiritless level of moribund mediocrity in men and life. There has even been a change of mental attitude towards the very rich. Neither vast individual wealth, nor vast aggregation of wealth constitutes a menace. Both are easily within the corrective and regulative powers of the governments. That which may have been accomplished by those who amass wealth is within the range of the aspirations of everybody. There are no generations between classes. It is realized also that there are advantages to the nation in compacted wealth. It is already mobilized; it can be

quickly and effectively used; it furnishes a rallying place for lesser wealth; it enables the doing of vast things. The owner is merely a trustee for the nation. The wealth is of no value to him except as he may use it or have it used in productive industry. All that he may charge for his trusteeship is the sum of his personal expenditures. The poorest paid of the laborers is the capable captain of industry. He cannot seriously waste that to which he has title, except by not utilizing it. Even foolishly luxurious living is not a total waste. The more profitable the industry, the lesser the percentage of waste and the larger the amount of capital available for the use of all labor. All capital is labor's capital.

The labor unions and like organizations are neither to be dispised nor feared. They should be kept usefully at work. They furnish effective agencies for properly influencing and expressing public opinion. All the political forces of America are sensitively responsive to this force. The organizations may be regarded as efficient agents of democracy, enabling an enlargement of the direct power exercised by the people in the conduct of government, and increasing the benefits and the dangers of democracy.

But with most of the people of America, both capitalists and laborers, and all the people of America interested in the proper utilization and the proper reward of labor, and in the development and conservation and utilization of wealth, there can be no toleration of any system which will enable any one class of working men to dictate the cost and thus fix the price of transportation, or of any service or commodity upon which the entire economic life of the nation depends.

The new constitution is almost without safeguards. The people are not afraid of themselves. They apparently feel that they have the intelligence not to destroy the good in their institutions; that they may take liberties with the written part of their constitution; that they may leave their constitution adjustable, flexible, responsive to what seems to be a present need though the new policy may conflict with principles heretofore regarded as fixed. Possibly they are unduly confident of their power to indulge without danger in a character of lawlessness.

It is difficult to put into concise definite words a thing so

essentially adjustable and mutable, but the new constitution connotes:

(1) A nation of white people, with other elements only partially assimilated;

(2) A social system based upon a white civilization which discriminates against all other races;

(3) A capitalistic economic system, with capital controlled by state legislatures, Congress and labor unions;

(4) A direct democracy, representative in form, in which the male slightly predominates, and in which all races and colors are formal but not effectively recognized;

(5) A system of parties—those effectively participating in the government products of history and heredity—representing from time to time varying principles and policies, and of constituent members of every shade of political thought;

(6) A framework of government providing for:

(a) An executive, who governs the country in times of war and in times of peace, exercises limited defined powers;

(b) A legislative department with powers practically unlimited, but largely directly controlled by the people;

(c) A judicial department which acts as a conservative force, protects vested rights from confiscatory state action and prevents disorderly and precipitate changes in the Constitution;

(d) Boards and commissions exercising legislative, judicial and executive functions;

(7) A division of the territory of the nation into states which exercise not unimportant governmental functions, including:

(a) Such police jurisdiction as has not been taken over by the general government;

(b) Adjudication of cases between citizens of the state when no federal question is involved;

(c) The determination of general property rights subject to the fourteenth amendment;

(8) The further sub-division of the territory for minor administrative purposes.

I have not undertaken to discuss the merits of the new constitution. I neither condemn nor commend it. It is so, and being so, it is inevitably so. Its strength is in the masses of intelligent people who do not care to risk their property by radical and experimental changes. Its weakness is the weakness of all democracies—the strength of the mob. Power has been taken from forty-eight state legislatures and given to Congress. This concentration of power has created a dangerous weakness, making easy the exercise of the mob's violence.

That a nation, growing and developing as rapidly as the United States should have broken the restrictive bonds of words was inevitable; to realize that just as important changes are imminent does not require the prevision of a seer.

In the great crisis for civilization, the Constitution has not so far failed; it is being subjected to the supreme test in a determination of whether prejudice, partisanship and selfishness are to prevent the nation's duty to its own people and all mankind.

POWER OF CONGRESS TO TAX STATE SECURITIES UNDER THE SIXTEENTH AMENDMENT.

BY

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OF MARYLAND.

In approaching this question it is necessary to bear in mind certain principles of constitutional law firmly established before the adoption of the sixteenth amendment.

In the first place, the nation and the states each being sovereign within their respective spheres, it had long been settled that the nation could not tax the agencies or instrumentalities of any state, and that no state could tax the agencies or instrumentalities of the nation.

The Supreme Court had repeatedly condemned federal legislation which, through taxation, encroached upon the sovereignty of the states, and had just as repeatedly condemned state legislation which, through like means, encroached upon the sovereignty of the nation.

Thus, in Dobbins *vs.* Commissioners of Erie County, 16 Peters 435, it was held that the state had no power to tax the salaries of federal officers. In M'Culloch *vs.* Maryland, 4 Wheat. 316, it was held that the state could not tax the Bank of the United States; and in Weston *vs.* Charleston, 2 Peters 449, that the state could not tax federal securities.

In United States *vs.* Baltimore & Ohio Railroad Company, 17 Wall. 322, it was held that Congress could not tax the interest on city securities, a municipality being a governmental agency of the state, and thus entitled to the state's immunity; and in Pollock *vs.* Farmers Loan and Trust Company, 157 U. S. 429, 158 U. S. 601, it was held that Congress could not tax the income from state or city securities.

The principle that Congress could not tax state securities or their income had also been recognized as established in numerous other cases, among which may be mentioned:

Merchants Bank *vs.* New York, 121 U. S. 138, 162.

Snyders *vs.* Bethman, 173 U. S. 509, 515.

Knowlton *vs.* Moore, 178 U. S. 41.
South Carolina *vs.* United States, 199 U. S. 452.
Flint *vs.* Stone Tracy Co., 220 U. S. 107.
Farmers' Bank *vs.* Minnesota, 232 U. S. 516, 527.

This immunity of the nation and the states was not due to any specific limitations in the Constitution itself. It existed because of the inherent structure of the Constitution, which differentiates between the granted powers of the nation and the reserved powers of the states. The sovereignty of each, in their respective spheres, is the very essence of our form of government, and anything which would encroach upon either sovereignty must necessarily be destructive of our constitutional scheme.

The power to tax need not, of course, be exercised to destroy, but it may be exercised to destroy, and it always involves a control over the operations of government. The state governments and the national government could not each be supreme in their respective spheres, if either had the power to tax the instrumentalities of the other. If such power to tax were not used to destroy, nevertheless the power to use it at all would unavoidably carry the power to the nation to control the governmental operations of the states and the power to the states to control the governmental operations of the nation, and so neither nation nor states would be sovereign.

The basic principle of our Constitution, however, is that each shall be sovereign, so that the necessary conclusion has always been thoroughly recognized that neither can tax the instrumentalities of the other.

Around this principle, just as around every other principle, there were thrown certain limitations.

Thus, for congressional action to violate the Constitution in this regard, the interference with state sovereignty must be direct and substantial, and not such, for instance, as incidentally arises from a corporation excise tax, Flint *vs.* Stone Tracy Company, 220 U. S. 107; or from a succession tax on property in the hands of an executor before distribution to a municipality as legatee, Snyder *vs.* Beltman, 190 U. S. 249, 253.

Likewise, the interference inhibited is one which affects sovereign or governmental functions, so that, for example, if a state or a municipality engages in the sale of liquor, federal taxation

is not invalid, South Carolina *vs.* United States, 199 U. S. 452; Salt Lake City *vs.* Hollister, 118 U. S. 256, and compare Ambrosini *vs.* United States, 187 U. S. 1, 7.

But these limitations have only served to emphasize the principle itself, when confined within its appropriate sphere, and to establish all the more firmly the proposition that any act of Congress which amounts to a direct interference with the states in their sovereign or governmental functions is unconstitutional and void.

Next, we find that the power of the nation or of the states to borrow money, and to issue securities therefor, is a recognized governmental function. It has been argued that this is not so, that the power to borrow is not a sovereign power, because public moneys could still be raised by taxation even if the borrowing power were taken away or interfered with. The conclusion sought from this argument is that an act of Congress taxing state securities would not be an interference with the sovereignty of the state, because the issuance of such securities by the state is not a governmental power.

But the argument is not sound. That the borrowing power is a governmental function is demonstrated by the universal use of this power by all governments throughout the world, and by the economic impossibility of raising large sums of money through taxation alone. This question can no longer be considered debatable, after the decisions in United States *vs.* Railroad Company, 17 Wall. 322, and in the Pollock cases, 157 U. S. 429, 158 U. S. 601. The power of the states to issue state securities is a sovereign, governmental power; a power in Congress to tax state securities would be the power to interfere directly with this sovereign power of the states; and, therefore, it has always been recognized that the exercise of such a power by Congress would be void.

Finally, we find it equally well settled that for Congress to tax the income from state securities is just as unconstitutional as it would be for Congress to tax the securities themselves. A tax upon the income from state securities is the same as a tax on the securities, and is equally invalid. The Pollock case does not leave this open to debate.

At the time, then, of the adoption of the sixteenth amendment, we find the inability of Congress to tax the income from state securities established, not as an ordinary principle of law only, but as something growing inevitably out of the scheme of our Constitution, and as inseparably connected with the respective sovereignties of nation and states which that constitution guarantees.

If, now, the sixteenth amendment gives Congress the power to tax the income from state securities, it does much more than authorize Congress to enter upon a new field of taxation. It authorizes Congress to interfere directly with the governmental operations of the states themselves, because the issuance of state securities is clearly a governmental function of the states, and a tax upon the income is the same thing as a tax upon the securities themselves. It involves a national control over state sovereignty which is entirely at variance with the structure of our Constitution, because that is based on state sovereignty uncontrolled, within its sphere, by the nation.

What is the language of the sixteenth amendment which could be said to justify such a result?

This amendment reads:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

If, now, this be construed as the grant of power to tax incomes, irrespective of the source from which the income flows, then the power to tax the income from state securities would doubtless follow, because the power would embrace income derived from any source, and income from state securities as a source would be included as well as income from all other sources.

A tax so at variance with the structure of our Constitution could perhaps be authorized by an amendment to the Constitution, however it would encroach upon the state sovereignty on which our institutions rest. But no such interpretation should be given unless the intention clearly calls for it, and certainly not if the conditions which gave rise to the amendment indicate that no such purpose was in mind.

In interpreting the sixteenth amendment in this regard, we do not receive very much help from the congressional debates which preceded its passage. The amendment was introduced in Congress following a special message from President Taft, and was passed without any reference in the debates, which I have been able to find, to an interpretation which might justify the taxation of income from state securities.

This possibility seems to have been first suggested in a message from Governor Hughes to the legislature of New York, when the amendment was before that body for ratification. Governor Hughes opposed ratification upon this ground. (Foster's Income Tax, 2d Edition, Sec. 27, p. 78.) Senator Root took the opposite view in a letter to a member of the New York State Senate (Foster's Income Tax, 2d Edition, Sec. 27, p. 80, 45 Cong. Record, p. 2539, and 56 Cong. Record, p. 10630), and so did Senator Borah on the floor of the Senate. (Cong. Record, February 10, 1910, pp. 1694-1698.) Senators Bailey and Brown (the latter of whom had introduced the amendment), agreed with Senator Borah. Governor Fort of New Jersey took the same view. (Foster's Income Tax, 2d Edition, Sec. 27, p. 79.)

On the other hand, Governor Wilson of Kentucky (43 Chicago Legal News 251), Professor Minor (15 Virginia Law Register 737), and others agreed with Governor Hughes. Many of these gentlemen, however, felt that the amendment should be adopted even if it did authorize the taxation of state securities, on the ground that the power would never be exercised, and, therefore, even if it existed the amendment should not be rejected because of it.

In spite of these differences of opinion, it is certainly fair to say that the taxibility of state securities, or the income therefrom, was in no sense the main issue before the state legislatures which considered the adoption of the sixteenth amendment. That issue was rather the resistance of the capitalistic element to what they considered a socialistic tendency.

After the adoption of this amendment, the question was, of course, debated in Congress during consideration of the Revenue Act of 1918, because the House of Representatives inserted in this bill a provision taxing the income from state securities after a vigorous constitutional argument against it by former Gov-

ernor Montague (56 Cong. Record, pp. 10360, 10372-10377). This provision, however, was defeated in the Senate (56 Cong. Record 530). Senators Kellogg and Thomas attacked its constitutionality (56 Cong. Record, pp. 10630, 11181), as did Senators Borah and Brown, and Senator Knox supported it.

Mr. Taft, in a letter published in the Philadelphia *Ledger* of October 16, 1918, took the view that the provision was unconstitutional.

It seems to me that a clear understanding of the conditions which gave rise to the amendment removes any real difficulty as to its meaning in this connection.

Previous to the adoption of the sixteenth amendment the constitutional provisions directly relating to this phase of the taxing power were:

ART. 1, SEC. 2: "Representatives and direct taxes shall be apportioned among the several states according to their respective numbers," the enumeration and census of the populations being then provided for. See also 14th Amendment, Section 2.

ART. 1, SEC. 8: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

ART. 1, SEC. 9, CLAUSE 4: "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

It is, of course, clear and elementary that under these provisions two great classes of federal taxes are recognized, namely, direct taxes and indirect taxes, and that when taxes are direct they must be apportioned and when they are indirect they must be uniform. It is equally clear and elementary that in requiring the apportionment of direct taxes, what was meant was that such taxes must fall proportionately upon the several states, in accordance with their respective populations as determined by the census, in order that taxation and representation, the latter being apportioned in the same way, "should go together."

Before the Pollock case was decided, in 1895, it was generally understood that the only direct taxes were capitation taxes and taxes on land. As early as 1796 a tax on carriages was held not direct, in Hylton *vs.* United States, 3 Dallas 171, and as late as 1880 a tax on income was held not direct, in Springer *vs.*

United States, 102 U. S. 586, and such taxes were accordingly sustained although not apportioned.

In the Pollock case, however, the Supreme Court held that the tax imposed, by the federal income tax law of 1894, upon the income from land, was the same as a tax on the land itself, and was, therefore, direct; and that the tax was unconstitutional, because not apportioned among the states in proportion to their respective numbers, in accordance with the census or enumeration thereof. (157 U. S. 429.) On rehearing, this ruling was extended to cover the taxation of income from personalty, this tax being also held direct, and unconstitutional because not apportioned. (158 U. S. 601.)

To these opinions there were vigorous dissents, but whether the decisions were sound or not is not particularly material to the question here under consideration. The thing which is material is that the decision in the Pollock case shows quite clearly that the sixteenth amendment was not intended to and does not authorize Congress to encroach upon state sovereignty by taxing state securities or the income therefrom.

The decision in the Pollock case was that the 1894 tax levied on the income from land and personalty was a direct tax, and not being apportioned among the several states in accordance with the census or enumeration of their respective populations, it violated Article 1, section 9 of the Constitution, which required all direct taxes to be laid in proportion to the census or enumeration of the several states.

The effect of this decision was to make a federal income tax a practical impossibility, because the rule of apportionment among the states applied to such a tax would be manifestly unfair and unjust. It would place a disproportionate burden upon the many, at the expense of the few. The growing need during the succeeding years for increased government revenue, due largely to decreasing custom and revenue receipts, and culminating in a large deficit in 1908, drew sharp attention to the necessity of power for a workable income tax law. The question became a political one, and a campaign issue.

Now, the constitutional barrier to the income tax of 1894 was, as has been shown, the fact that, being a direct tax, it was not apportioned among the several states, and this constituted a bar-

rier to any other income tax modeled on the same general lines. This barrier could only be removed by amending the Constitution so as to authorize an income tax to be laid without apportionment. The natural way to do this was to provide in the amendment that such an income tax could be laid without the necessity of apportionment among the states, thus removing the restriction which the Pollock case held had invalidated the income tax of 1894. The condition which made an income tax impracticable was the Supreme Court's decision that such a tax on the income from property had to be apportioned. The remedy was to remove the necessity for such apportionment.

When, now, the sixteenth amendment provides that "Congress shall have power to lay and collect taxes on incomes," it did not confer any power to levy income taxes in a generic sense, because that was a power already possessed and never questioned. It existed from the beginning under Section 8 of Article 1 of the Constitution, authorizing Congress "to lay and collect taxes, duties, imposts and excises," a power which is exhaustive and has always been held and understood to embrace every conceivable power of taxation, including the power to lay income taxes.

But this power to levy any kind of taxes was also clearly subject to the limitation that if the taxes were direct, then they had to be apportioned among the several states, under Article 1, section 9 of the Constitution. This necessarily raised the question whether any particular tax was direct or not, because if it was, then it was unconstitutional unless apportioned. This question, in the case of an income tax, involved an examination of the source from which the income was derived, in order to ascertain whether or not the tax was direct.

When, therefore, the sixteenth amendment provides that the power to tax incomes—a power which was not granted by the amendment, because it had always existed—was to be a power to tax incomes "from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," it becomes obvious that the purpose of the amendment was to remove the qualification which the decision in the Pollock case had placed upon income taxes which are direct, namely, that they must be apportioned, and, further, to remove the necessity of examining the source of the income in order to see whether the tax is direct or not.

Let us state a little more fully the purpose of inserting the words "from whatever source derived," because it is on these words that the power to tax the income from state securities, if it exists, must rest. This is so because previous to the sixteenth amendment this power clearly did not exist, so that if it exists now it must be because the amendment confers on Congress a power to tax incomes which without the amendment Congress would not have.

The argument for this new power can only be that it flows from the provision of the amendment authorizing a tax on incomes "from whatever source derived." Therefore, if these words do not constitute a grant of power at all, if, instead, they simply remove a limitation growing out of the Pollock case, then the argument falls, and the sixteenth amendment confers no authority to tax state securities or their income.

Direct taxes, under the Constitution, must be apportioned, and, consequently, before the sixteenth amendment, when income was taxed it had to be determined whether the tax was direct, because if it was, then, under the Pollock case, it was unconstitutional unless apportioned. This meant that the courts had to look to the source from which the income was derived to determine whether the tax was direct or not.

There are, of course, income taxes which are not direct taxes. Taxes on the income from land and personalty are direct, under the Pollock case. But taxes on gains, profits, wages or salary either are not or may not be direct, and when they are not, then there was never any requirement that they be apportioned. In the Pollock case, all the judges agreed that taxes on income derived from business or occupation need not be apportioned. Therefore, the authority in the sixteenth amendment to tax income "from whatever source derived," simply removes the necessity which the Pollock case imposed, of examining the source from which the income is derived, in order to see whether the tax will be direct or indirect. The source is excluded as a criterion to determine whether the constitutional requirement for the apportionment of direct taxes applies or not. No matter what the source, that requirement will not apply. The source is simply immaterial.

Therefore, the sixteenth amendment does two things. First, it removes the necessity of examining the source of the income,

to see whether the tax is direct or indirect, and, secondly, if the tax is direct, then it removes the qualification that it is unconstitutional unless apportioned.

Thus we have a perfectly simple and natural explanation of the language used in the sixteenth amendment and it completely negatives the idea that it authorizes Congress to tax anything which it could not constitutionally tax before. It simply removes the qualification, which grew out of the Pollock case, as to the necessity of apportioning income taxes when they are direct, and the necessity for determining the source from which the income is derived in order to ascertain whether the tax is direct. It was passed to do away with the principle on which the Pollock case was decided.

That this is the true effect of the sixteenth amendment is held either directly or in effect by the Supreme Court in:

Brushaber *vs.* Union Pacific Railroad Co., 240 U. S. 1.
Stanton *vs.* Baltic Mining Co., 240 U. S. 103.
Tyee Realty Co. *vs.* Anderson, 240 U. S. 115.
Peck & Co. *vs.* Lowe, 247 U. S. 165.

The result must be that the sixteenth amendment confers no power on Congress to tax state securities, or the income therefrom. The amendment does not enlarge at all the taxing power of the nation. It brings no subject within the range of that power which was not there already. Those subjects, and those only, are subject to national taxation since the adoption of the amendment which were so subject before its adoption. State securities, and their income, could not be taxed by the nation before the amendment was adopted. Therefore, they cannot be taxed now.

It only remains to consider briefly the argument which has been advanced that Congress might levy a tax on the income from state securities in the exercise of its war powers.

The weakness of this argument is reflected by the decision in United States *vs.* Railroad Company, 17 Wall. 322, where the Supreme Court held that Congress had no power to tax state or municipal securities in 1864, a time when the country's credit was sorely tried as a result of the Civil War. It appears from the dissenting opinion, page 334, that this point had been considered by the court. It had also been raised in Collector *vs.*

Day, 11 Wall. at page 114. And in United States *vs.* Hoslef, 237 U. S. 1, the war stamp tax of 1898 on charter parties was held invalid.

But the complete answer lies in the fact that our Constitution is a constitution for war as well as for peace. Its principles are in no sense suspended during war. They cannot be, because they provide fully for the conduct of war. It is true that during war Congress may invade fields which may be closed to it in time of peace. Instances of this have not been wanting during the war now coming to a formal as it has already come to an actual end—for example, the control of food supply, of manufacture and of production. But the exercise of such powers did not suspend the Constitution. They were in furtherance of the war powers granted by the Constitution.

Congress has no more power in war than it has in peace to upset the structure of the American Constitution. The sovereignty of the states must endure so long as our Constitution endures. State securities cannot be taxed because to tax them would involve a breaking down of the sovereign independence of the states, and the sixteenth amendment does not authorize this. This state sovereignty is fundamental. War cannot authorize its invasion.

That the sixteenth amendment confers no power on Congress to tax state securities or their income, either in war or in peace, seems to me clear as a legal proposition. Is it not equally clear that a contrary conclusion would strike at the very foundations of our government?

The American form of government is the eldest written form of government in the world today. Others have been patterned after it, but no other has survived one hundred and thirty-seven years of trial. Through the social, economic and industrial eras through which we have passed, through the triumphs and the sorrows of six mighty wars, our form of government has stood unshaken in its essential structure. To it we owe all that we have been, and all that we are. It is our best hope for a future which will be wholesome, sane, law-abiding and prosperous.

There is no part of the Constitution more essential to the whole than the balance it sets up between the nation and the states. Encroach upon that to any substantial degree, break

down that balance to any measurable extent, and the way has been opened for a form of government which, whatever be its nature, is no longer the form of government under which we have grown and prospered.

Once make the borrowing power of the states subject to taxation by the nation, and you give the nation a control over the government functions of the state which destroys, by just so much, state sovereignty. This destruction is not theoretical, it is actual. For the governmental functions of the state are carried on by borrowed money, no less than by money raised through taxation. Subject the securities issued by the states for such borrowed money to federal taxation, and inevitably you place the performance by the states of their governmental functions at the mercy of the federal government.

To deny the nation a power so far-reaching in its consequences, is to deny no power which the nation ought to have. It is simply to deny a power which, were it to exist, would be destructive of state sovereignty. It is to deny a power which the nation cannot have, if we are to preserve the basic structure of the United States Constitution.

SOME LEGAL QUESTIONS OF THE PEACE CONFERENCE.

BY

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SECRETARY OF STATE.

I realize that any subject which has to do with the Peace Conference possesses at this time a peculiar interest not only to members of the legal profession, but in fact to men of every avocation and every nationality. At the same time to treat of these subjects dispassionately and without inviting the charge of undue prejudice is by no means an easy task. We are still so near the great war and its dreadful consequences, so near the complex questions which were considered and decided by the Paris Conference, that it is practically impossible to form a true perspective of the proceedings of the conference or to give even a relative value to the things that it accomplished.

A man, however learned he may be or however high a reputation he may have gained as a statesman or political thinker, cannot speak with certainty of the future. Emphatic or intemperate utterances in favor of or against the settlements reached by the nations represented at Paris ought not to be made; and, if made, they will assuredly not receive the unqualified approval of men of broad vision and judicial mind. It is unfortunate that the difficulties and obstacles which had to be overcome or avoided by the negotiators cannot be fully explained at this time. If they could be, I believe that many of the objections to the treaty would vanish or at least not be urged by those who have been vehement in their denunciation of some of its provisions. I am sure that it is ignorance or at least incomplete knowledge which has induced much of the criticism of those who are otherwise familiar with our foreign affairs. I prefer to believe this to be the cause, rather than to charge them with intellectual dishonesty or with being governed by their emotions or by motives unworthy of any one who seeks to be just in forming an opinion.

In discussing the legal questions, which are suggested by the Peace Conference or are directly raised by the Treaty of Peace, it is my purpose to do so as impartially as possible. Of the two classes the suggested questions rather than the definite questions presented by the provisions of the treaty are to my mind the most important. They may lack the preciseness of a formulated provision, but they invite the especial consideration of those who are interested in the philosophy of law and its interpretation into a standard of international conduct.

It is manifest that this war has given an impetus to what is commonly termed Internationalism, though it would be more proper to call the communistic doctrine Mundanism. This pseudo-Internationalism seeks to make classes or in some cases individuals the units of world organization rather than nations. It is the enemy of Nationalism which is the basis of world order as we know it. It is a real, though not always an open, enemy of national independence and of national sovereignty. Its more radical adherents demand class allegiance and discourage or denounce national allegiance. In its extreme form it purposes to remove national barriers and to overthrow national governments whether democratic or monarchic in form. This is not a new communistic doctrine or theory, but it never became an actual menace to the present social order until the successful revolution in Russia fell into the hands of the Bolsheviks. Spreading from this center of unrest and disorder the movement has today assumed proportions which command the serious consideration of every civilized people. In certain lands the economic conditions and state of wretchedness resulting from the war have been peculiarly favorable to its growth. However safe this country may be from the more pernicious forms of this doctrine and however confidently we may rely upon the sound common sense of the American people, we cannot ignore the dangerous possibility that moderate forms may under certain influences develop into extreme and threaten our political institutions. We ought to realize that the world cannot be organized on both Mundanism and Nationalism. The political cleavage must be between nations or between classes. We must choose between these two conceptions of world order.

I have no doubt what the final verdict will be unless thoughtful men fail in their duty. It will be for Nationalism, not the evil form of Nationalism which was the bane of the 18th and 19th centuries, but the democratic form which will develop in the present century and become the cornerstone of the new order.

I have referred to Nationalism in this connection because the Treaty of Peace by its terms and method of negotiation makes the nation the unit of responsibility and of right. The Treaty is an agreement between sovereign states and imposes obligations upon nations, not upon individuals. Thus it announces to mankind that the nationalistic idea is to be preserved as the basis of society and that nation will deal with nation as in the past.

This fact is of importance from the legal standpoint since it shows that international law, and not world law affecting individuals, is to continue as the standard of intercourse between governments and peoples. With such an evidence of the will of mankind and with such an assurance that Nationalism will not be abandoned, we can proceed to rebuild our international system and codes upon sure foundations.

In times of peace there have been three ways of composing international controversies, namely, diplomatic settlement, mediation, an aid to diplomatic settlement, and judicial settlement. The Treaty of Versailles has not changed these three methods. They exist in the Covenant of the League of Nations which declares for arbitration, international inquiry and mutual understanding. The peaceable settlement of a controversy between nations thus falls within the sphere of legal justice or the sphere of diplomacy, since mediation or inquiry is an adjunct to an amicable arrangement between the parties to a dispute, and therefore is diplomatic in character.

The Covenant has gone far in developing a new process of diplomatic adjustment of such differences as have been heretofore the frequent causes of war between the disputants, but its only contribution to the advancement of international arbitration is to make it in a measure partially compulsory, and to provide that "plans for the establishment of a Permanent Court of International Justice" should be formulated and submitted to the members of the League by the Council. It is with this latter provision that jurists should be particularly concerned, for the

usefulness of this instrument of settlement depends upon the proper constitution of such a tribunal and the practical method of procedure before it.

Many of us, who have had experience before international courts and commissions, have realized the inadequacy and unsatisfactory character of the present system of arbitration and the imperfect, if not objectionable, method of procedure which has been followed. Appreciating now as we did not before the evil purposes which the Powers of Central Europe had so long secretly cherished, it is remarkable that The Hague Convention of 1907 developed as far as it did a workable system for the judicial settlement of international disputes. I have no sympathy with those who criticise or condemn the accomplishment of that great assembly of distinguished statesmen and jurisconsults who formulated an instrument and a method by which justice could be applied to nations as national judiciaries have applied it to individuals. It is ignorance of the difficulties of their task or in some cases I fear a less justifiable reason which has induced unfavorable comment of, or contemptuous indifference to, the real achievements of The Hague Conferences.

The creation of The Hague Court was a tremendous forward step in the prevention of international wars in that the signatories to the organic convention committed themselves to the standing policy that justice should be the controlling principle in all relations between nations and that its application to concrete cases by an impartial tribunal ought to supersede the ancient and barbarous method of trial by combat. I desire to register here my personal appreciation of the great service which was rendered by The Hague Conferences of 1899 and 1907 in furnishing the world a definite system of international judicature. Along the general lines of The Hague Convention the nations should build a new and more substantial structure eliminating those weaknesses and undesirable features which were the consequence of the improper motive of certain powers, particularly the German Empire, and of their false conception of their national interests. It would be folly to cast aside all that has been achieved and attempt to create something entirely different. In our desire to make this new era a better one than the one from which we have emerged, we must not let idealism run away with common

sense or assume that we possess a mentality far superior to our predecessors. Past methods are not all worthless because they failed to accomplish their objects in the extraordinary and abnormal circumstances which resulted in the World War. I do not believe that any human agency could have prevented the conflict through which we have passed so long as greed and ambition were the supreme impulses of the German Autocracy. If the German Government had not been inspired by these evil motives and had not believed that it possessed the physical power to gratify its desires, who is prepared to say that The Hague Convention of 1907 would not have furnished a sufficient instrument to settle peaceably controversies which might without it have produced international wars?

The fact is that under present conditions, even with Autocracy vanquished and Democracy triumphant, we have to face the same problems, though modified by a better conception of the truth and a less ruthless disregard of right. It is, I believe, a better world, but by no means a perfect world. Though less threatened by the sinister influence of national avarice we are not free from it entirely. I do not know that the world will ever be until it is spiritually regenerated. As I see it there is only one principle for the direction of international intercourse which will under present conditions command the universal approval of nations, and that is the principle of justice, not in the general and abstract sense, but in the restricted sense of legal justice.

Justice in the broad sense is attractive to the reformer and the idealist. As a Nation we ought and doubtless will be guided by it in our relations with other nations. But, when we come to formulate our foreign policies upon the belief that justice in the abstract is a dominant force in the regulation of world affairs, we are building on a foundation which, however desirable, is by no means certain. We must recognize the fact, unpalatable though it may be, that nations today are influenced more by selfishness than by an altruistic sentiment of justice. The time may come when the nations will change their present attitude through a realization that uniform justice in foreign as well as in domestic affairs is the highest type of expediency, but that time has not yet come, and, if we are wise, we will not deceive ourselves by assuming that the policies of other Governments are

founded on unselfishness or on a constant purpose to be just even though the consequences be contrary to their immediate interests.

Yet, while abstract justice cannot be depended upon as a firm basis on which to constitute an international concord for the preservation of peace and good relations between nations, legal justice offers a common ground where the nations can meet to settle their controversies. No nation can refuse in the face of the opinion of the world to declare its unwillingness to recognize the legal rights of other nations or to submit to the judgment of an impartial tribunal a dispute involving the determination of such rights. The moment, however, that we go beyond the clearly defined field of legal justice we enter the field of diplomacy where national interests and ambitions are today the controlling factors of national action. Concession and compromise are the chief agents of diplomatic settlement instead of the impartial application of legal justice which is essential to a judicial settlement. Furthermore, the two modes of settlement differ in that a judicial settlement rests upon the precept that all nations, whether great or small, are equal, but in the sphere of diplomacy the inequality of nations is not only recognized, but unquestionably influences the adjustment of international differences. Any change in the relative power of nations, a change which is continually taking place, makes more or less temporary diplomatic settlements, but in no way affects a judicial settlement.

However, then, international society may be organized politically for the future and whatever machinery may be set up to minimize the possibilities of war, I believe that the agency which may be counted upon to function with certainty is that which develops and applies legal justice. Every other agency, regardless of its form, will be found, when analyzed, to be diplomatic in character and subject to those impulses and purposes which generally affect diplomatic negotiations. With a full appreciation of the advantage to be gained for the world at large through the common consideration of a vexatious international question by a body representing all nations, we ought not to lose sight of the fact that such consideration and the action resulting from it are essentially diplomatic in nature. It is, in brief, the transference of a dispute in a particular case from the capitals of the disputants to the place where the delegates of the nations

assemble to deliberate together on matters which affect their common interests. It does not—and this we should understand—remove the question from the processes of diplomacy or prevent the influences which enter into diplomacy from affecting its consideration. Nor does it to an appreciable extent change the actual inequality which exists among nations in the matter of power and influence.

On the other hand, justice applied through the agency of an impartial tribunal clothed with an international jurisdiction eliminates the diplomatic methods of compromise and concession and recognizes that before the law all nations are equal and equally entitled to the exercise of their rights as sovereign and independent States. In a word, international democracy exists in the sphere of legal justice and, up to the present time, in no other relation between nations.

Let us then with as little delay as possible establish an international tribunal or tribunals of justice with The Hague Court as a foundation; let us provide an easier, a cheaper and a better procedure than now exists; and let us draft a simple and concise body of legal principles to be applied to the questions to be adjudicated. When that has been accomplished, and it ought not to be a difficult task, if the delegates of the Governments charged with it are chosen for their experience and learning in the field of jurisprudence, we will, in my judgment, have done more to prevent international wars through removing their causes than can be done by any other means that has been devised or suggested.

I have but just returned from six months spent in the settling of controversies between nations through the medium of a great international conference, which followed the customs and practices of diplomacy as they will unquestionably be followed by all deliberative bodies representing the nations. I believe that I know and understand the currents and countercurrents which impelled action and influenced decisions in that conference. It is not my purpose to review the conduct of those negotiations or to imply more than that they were diplomatic in character. But with this experience vividly in mind I cannot too strongly assert that international justice interpreted and applied by an impartial court can do more to prevent future wars than any agency, single or collective, operating in the sphere of diplomacy.

The mind of the world was never more receptive to the idea of applied justice. Mankind has endured such terrible woes from injustice and lawlessness, that they seek above all things the restoration of the rule of law and justice. The governments cannot ignore this universal demand. They should not. They cannot too soon set up the machinery and let it get to work in the settlement of the controversies which continue to arouse apprehension and concern among those who seek to see a sure foundation laid for a permanent peace.

To adopt an international code of principles for the guidance of an international court of justice is, I believe, as essential as the creation of the court itself. After every great international war changes in methods and weapons have compelled a revision of the rules of warfare. The principles have not changed so much as their application to new conditions. The changes that will have to be made after this war, which for magnitude and ingenuity in the destruction of life and property surpassed all previous wars, are numerous and radical. In the past, governments have employed their armies and navies against one another as champions of their respective nations. The noncombatants of the populations have formed a class which was without military value and which was on that account free from hostile attack. But today each able-bodied individual in a state, though not serving in the armed forces of a belligerent, is a distinct asset in the prosecution of a war. The workman in the shop, the peasant in the field, the miner underground, the sailor on the merchant ship, are necessary factors in the prosecution of a war as they never were before. This Great War has been a war of peoples, and not a war of armies and navies alone. Whole nations have been mobilized in the supreme effort to vanquish their enemies. How this manifest fact will affect the rules for the immunity and protection of noncombatants is a question which will require very careful consideration.

The introduction of the submarine, the aeroplane, and the dirigible, made possible by the invention of the internal-combustion engine, the use of the wireless telegraph and telephone, and the employment of lethal gases, of supercannon and possibly of aerial torpedoes make obsolete many rules formerly observed but now ignored.

What is to become of the rules of blockade as they existed prior to 1914? Are we to continue the farce of distinguishing between articles contraband and noncontraband? What will be the rights and duties of neutrals after the experience of the last five years? Will there be, and can there be, such a thing as neutrality when a war involves many nations and shatters the commercial and social order of the whole earth? These are some of the problems which will have to be solved by those who will be charged with redrafting the rules of war on land and sea.

New and puzzling questions are also presented as to the application of principles of right in times of peace. The employment of aircraft and undersea vessels in commerce and communication, the regulation of the use of wireless telegraphy, the rights as to the operation of ocean cables, and other subjects of like nature should be fully discussed before the principles of international law are put into final codified form. Then, too, there is another group of subjects as to which definite principles should be laid down in order that the present uncertainty and confusion of rights may be removed. Among these subjects are the right of expatriation and naturalization, the precise nature of business domicile, the right to retain title to ocean cables cut or diverted during a war, and others which it is needless to recite, as enough have been stated to show the importance of the task which lies before the conference charged with the codification of the principles of law applicable in time of peace and the rules of conduct in time of war.

The system of mandatories under the League of Nations as provided in the Covenant, which to the casual observer appears simple in principle and application, is a novelty in political authority which, the more it is studied from the legal standpoint, the greater the number of problems which it presents.

The determination of the possession of the sovereignty over territory is essential to the determination of international rights and obligations. In the case of territory subject to a mandatory the question therefore arises as to who possesses the sovereignty of such territory. Certainly not the mandatory which derives its authority solely from an agreement conferring upon it a limited exercise of sovereign rights. Is it then the League of Nations which possesses the full sovereignty, the exercise of which is

delivered in part only to an agent or trustee? That would seem to be the logical answer, and yet consider the questions which that answer raises. Does the League of Nations possess the attributes of an independent state so that it can function as a possessor of sovereignty over territory? Is the League then a supernational world state clothed with world sovereignty? If the League possesses the sovereignty, can it avoid responsibility for the misconduct of its agent, the mandatory? If the League is not capable of possessing sovereignty, then who does possess it, who is responsible for the acts of the mandatory; and upon what ultimate authority does the League base the issuance of a mandate?

I might present a score of other questions of a similar nature which with those propounded will have to be definitely answered sometime if the mandatory system comes into operation. Today these questions are academic and may be considered technical and no doubt by many are so considered, but it may not be long before they become concrete and very practical. It is not an overstatement to say that nine-tenths of all international controversies arise over questions pertaining to the possession of sovereignty and the conflict of sovereign rights. I do not think that mandatories and the source of their authority can escape from the test of the legality of their exercise of sovereign rights. The system must be philosophically and logically worked out from the legal point of view or it will result in confusion. I do not say this in disparagement of the system, but only as a reminder that often that which appears simple is exceedingly complex when analyzed. It is needless, however, to say this to a body of jurists whose experience has taught them that difficulties are only too often hidden in a statute or a treaty provision, which seems at first plain and easy of enforcement. Personally, I believe that a definite legal formula can be found to bring the mandatory system into harmony with the conception of sovereignty, and the determination of international rights and obligations. But I am not prepared at this time to propound a theory to meet fully the situation, which possesses novel features, to say the least.

In addition to the variety of questions thus raised in connection with the idea of mandates, the principles governing the establishment of international servitudes will require careful study in order that they may be more clearly formulated than

they have been in the past. While there have been in certain instances rights of way over territory, the rules applicable to them have not been as fully defined as in the case of the common use of international waterways and of special rights in territorial waters. The new theory of servitudes on land differs from the old, which was based on expediency and mutual advantage, in that the new depends on an assertion of right which arises from an asserted principle that a nation ought not to be against its will barred from the sea, the common property and highway of mankind, and thus deprived of the opportunity to engage in ocean-borne commerce. How far this principle should go in support of the right to free ports and land transit is a question which must be answered with due regard to the rights of territorial sovereignty and national safety.

I might expand the list of subjects for consideration suggested by the Treaty of Peace which will invite the learning and wisdom of those who will, I sincerely hope, be charged with the codification of the principles of international law. Even if I subject myself to the charge of repetition, let me say that I most earnestly advocate the formulation of such a code by an international conference of jurists and publicists. With a definite standard of legal rights sanctioned by the nations, the administration of international relations as well as the administration of international justice, will become more consistent and less a prey to expediency and political opportunism.

There is one other subject of a legal character of which I desire to speak because it has excited much general discussion at home and abroad, and been the cause of some very intemperate and ill-considered expressions of opinion. I refer to the trial of the former German Emperor. I have a personal interest in that subject because it was my lot to preside over the Commission on Responsibilities constituted by resolution of the Conference on the Preliminaries of Peace and charged, among other things, with a consideration of the action which should be taken in regard to individuals responsible for the war and for violations of the laws and customs of war.

The Commission consisted of fifteen members, two named by each of the following powers: The United States, the British Empire, France, Italy and Japan, and one member each for Bel-

gium, Greece, Poland, Roumania and Serbia. My American colleague was Dr. James Brown Scott. Sir Gordon Hewart, the Attorney General of England, and Sir Ernest Pollock, the Solicitor General, alternated with each other as head of the British delegation. Among the other members were the jurisconsults Larnaude of France and Rolin-Jacquemyns of Belgium, Mr. Politis, the Greek Minister of Foreign Affairs and the Right Honorable W. F. Massey, the Prime Minister of New Zealand.

The Commission took up its work through the medium of three sub-Commissions and after two months of deliberations submitted its report subject to certain reservations by the American and Japanese delegations which were set forth and explained in separate memoranda annexed to the report.

It was apparent at the very beginning of our sessions that certain members of the Commission were determined before everything else to bring the Kaiser to trial for a criminal offence before an international high tribunal of justice to be constituted for the purpose primarily of determining his guilt and imposing upon him a suitable penalty for his crimes. There were three charges which could be urged against him, namely, that he was responsible for the war, that he was responsible for the violation of the neutrality of Belgium and Luxemburg, and that he was chargeable with the flagrant violations of the laws and customs of war perpetrated by the armed forces of Germany.

The first two charges were the ones which appealed most strongly to public opinion and aroused the bitterest indignation both in Europe and America. That any individual could plunge the whole world into such years of suffering resulting in the death of millions of human beings and the waste of billions of treasure, in the disorganization of society and the bankruptcy of nations, and go scot free, outraged mankind's sense of justice. From everywhere arose the cry for vengeance. It was under this pressure of popular demand and handicapped by the announced purpose of certain of its members to punish the Kaiser that the Commission began its task of studying the question of his criminal responsibility. From every point of view the question was examined and the arguments for and against his trial were considered, but in the end it was unanimously decided that a report could not be made charging the Kaiser with legal criminality for

beginning the war or for invading Belgium and Luxemburg. It was recognized that he had committed a great moral crime, an unpardonable offence against humanity, but the Commission was forced to find that there was no positive law declaring acts such as he had committed to be criminal and imposing a penalty on the perpetrator. The decision was reached with reluctance because of the firm conviction that the German ruler was guilty, although his guilt was not of a nature which could be declared and punished by a judicial tribunal.

The conclusions reached by the commission read as follows:

"1. The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.

"2. On the special head of the breaches of the neutrality of Luxemburg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.

"3. On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts.

"4. It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law."

The report in this declaration emphasizes the respect of the Commission for the supremacy of law over the natural impulse to be avenged upon one who richly deserved to pay the penalty for his evil deeds.

The third charge as to "violations of the laws and customs of war" was the one on which an agreement could not be reached. The conclusion in the report is thus stated:

"All persons belonging to enemy countries, however high their positions may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."

By this conclusion it is evident that the Kaiser might be brought to trial before a court with criminal jurisdiction, al-

though to establish his guilt as a violator of "the laws and customs of war or laws of humanity" would be no easy matter, provided the principles of legal justice and the common rules of evidence were observed by the tribunal before which he was brought. That he should be declared innocent of the charge was by no means an impossibility, if his judges were impartial and not merely instruments of vengeance.

To this conclusion the American members of the Commission dissented stating their position thus in their memorandum:

"The American representatives are unable to agree with this conclusion, in so far as it subjects to criminal, and, therefore, to legal prosecution, persons accused of offences against 'the laws of humanity,' and in so far as it subjects Chiefs of States to a degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations.

"Omitting for the present the question of criminal liability for offences against the laws of humanity, which will be considered in connection with the law to be administered in the national tribunals and the High Court, whose constitution is recommended by the Commission, and likewise, reserving for discussion in connection with the High Court the question of the liability of a Chief of State to criminal prosecution, a reference may properly be made in this place to the masterly and hitherto unanswered opinion of Chief Justice Marshall, in the case of the Schooner Exchange *vs.* McFadden and Others (7 Cranch, 116), decided by the Supreme Court of the United States in 1812, in which the reasons are given for the exemption of the sovereign and of the sovereign agent of a State from judicial process. This does not mean that the head of the State, whether he be called emperor, king, or chief executive, is not responsible for breaches of the law, but that he is responsible not to the judicial, but to the political authority of his country. His act may and does bind his country and render it responsible for the acts which he has committed in its name and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country, as otherwise to hold would be to subject to foreign countries a chief executive, thus withdrawing him from the laws of his country, even its organic law, to which he owes obedience, and subordinating him to foreign jurisdictions to which neither he nor his country owes allegiance or obedience, thus denying the very conception of sovereignty.

"But the law to which the head of the State is responsible is the law of his country, not the law of a foreign country or group of countries; the tribunal to which he is responsible is the tri-

bunal of his country, not of a foreign country or group of countries; and the punishment to be inflicted is the punishment prescribed by the law in force at the time of the commission of the act, not a punishment created after the commission of the act."

. . . . "The American representatives also believe that the above observations apply to liability of the head of a State for violations of positive law in the strict and legal sense of the term. They are not intended to apply to what may be called political offences and to political sanctions.

"These are matters for statesmen, not for judges, and it is for them to determine whether or not the violators of the treaties guaranteeing the neutrality of Belgium and of Luxemburg should be subjected to a political sanction."

I wish to direct your attention to this last sentence because the distinction betwen a political sanction and a judicial sanction determines the basis of the right to impose a penalty on the head of a foreign State.

As to all individual enemies chargeable with violations of the laws and customs of war and the laws of humanity, the report recommended the creation of a high international tribunal to try such persons as were not apprehended and tried before national courts of the Allied and Associated Powers, and who were selected for trial by a Prosecuting Commission of five members, one being named by each of the five principal powers.

The scheme, thus proposed, for the creation of a High International Court of Criminal Jurisdiction, with its complex machinery and necessity for national legislation to give it authority, to administer criminal laws enacted by various nations and also to interpret and apply the laws of humanity, was a novelty to which the American representatives refused to give full approval. Early in the discussions they submitted the following memorandum on the method which they favored for bringing to justice criminals of this sort:

"1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violations thereof;

"2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences is exercised by military tribunals;

"3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offence is committed on the territory of the nation creating the military tribunal or when the person or property injured by the offence is of the same nationality as the military tribunal;

"4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the law and the procedure for determining and punishing such violations established by the military law of the country against which the offence is committed; and

"5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus forming an international tribunal for the trial and punishment of persons charged with the commission of such offences."

In their memorandum annexed to the report, the American representatives, for the sake of reaching an agreement, conceded the possible expediency of an international commission to pass upon the military crimes affecting the nations of more than one country, because though it was not directly in accord with their idea of mixed courts-martial, it did not contradict the principle.

The American representatives did, however, oppose the extension of the jurisdiction of such a tribunal to offences against "the laws of humanity" as was recommended in the report, first, on the ground that the submission to the Commission on Responsibilities by the Peace Conference was limited in terms to offences against "the laws and customs of war," and, second, because the laws of humanity do not constitute a definite code with fixed penalties which can be applied through judicial process. The American Commissioners thus stated the second ground for their objections:

"As pointed out by the American representatives on more than one occasion, war was and is by its very nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it

may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity."

The report of the Commission on Responsibilities, with the reservations annexed, was laid before the Conference and received the immediate consideration of the Council of Four, or, as it is often called, the Supreme Council of the Allied and Associated Governments. The decision reached by the Council is contained in Articles 227 to 230 of the Peace Treaty.

Article 227 arraigns the former German Emperor for "a supreme offence against international morality and the sanctity of treaties," and provides that a special tribunal to try him shall be constituted composed of five judges appointed respectively by the United States, Great Britain, France, Italy and Japan. It also declares that the tribunal in its decision "will be guided by the highest motives of international policy" and shall "fix the punishment which it considers should be imposed."

Manifestly the tribunal thus created is not a court of legal justice, but rather an instrument of political power which is to consider the case from the viewpoint of high policy and to fix the penalty accordingly. And this is clearly stated in the reply of the Council to the observations of the German peace delegates on this subject. The pertinent portion of the reply reads as follows:

"They [that is the Council] wish to make it clear that the public arraignment under Article 227 framed against the German ex-Emperor has not a judicial character as regards its substance, but only in its form. The ex-Emperor is arraigned as a matter of high international policy as the minimum of what is demanded for a supreme offence against international morality, the sanctity of treaties and the essential rules of justice."

This course of procedure was in accordance with the suggestion made in the American memorandum that there might be a political sanction, but no judicial sanction for the offences of having caused the war and violated the neutrality of Belgium and Luxemburg.

Articles 228, 229 and 230 provided that persons accused of violating the laws and customs of war should be delivered up by Germany to be tried before national military tribunals of the Allied and Associated Powers, or, where the violation affected the nationals of more than one power, then before international mili-

tary tribunals composed of members of the military tribunals of the powers interested.

The recommendation of the Commission as to a general mixed commission to try such cases was rejected and the proposal of the American Commissioners in the memorandum laid before the Commission during its early sessions and repeated in its reservations was adopted by the Conference.

Furthermore no jurisdiction was conferred upon any tribunal over offences against "the laws of humanity," which had been, as I have indicated, vigorously opposed by the American representatives.

It was by no means an easy task to deal with the question of expressing properly mankind's condemnation of the individual whose inordinate vanity and greed were chiefly responsible for the dreadful misery and waste which the world has endured and from the effects of which it will suffer for many years to come. It was difficult to subordinate the natural feeling of indignation and the instinct to do vengeance to a cold, dispassionate consideration of the character of the Kaiser's acts and their relation to law and justice. Yet one of the reasons that our country entered the war was to bring lawlessness to an end. We believed that an undeviating respect for law is essential to the prosperity and happiness of society and that the rigid maintenance of law, however distasteful it may be, is an imperative duty. It was with a determination to follow these precepts, to treat impersonally and judicially the submission of the Conference, and to avoid being influenced by our own desires or by the pressure of public sentiment that we performed our duties as the American members of the Commission on Responsibilities and filed our reservations to the report of the Commission.

I have taken a good deal of your time and, I fear, have tried your patience unduly in reviewing this question of the trial and punishment of the Kaiser, and yet the deep interest which it has excited and the various opinions expressed by jurists and laymen which have been published seemed to me to entitle it to more than a passing notice.

There is also another class of legal questions which are raised by some of the provisions of the Treaty of Peace as well as by some of the propositions advanced at the Peace Conference.

They are questions which have to do with constitutional powers and constitutional limitations. I shall not even attempt to suggest the subjects falling within this class. Those to which I have referred in detail pertain essentially to the principles and generally accepted rules of the Law of Nations and to the administration of international justice. To go beyond those subjects would be to enter the wide field of Constitutional Law. Into that field I shall not venture.

In conclusion let me emphasize by repetition what I said at the beginning of my remarks, because it seems to me that the world is approaching the most critical decision that it has had to make since history began. Let me repeat: Nationalism must be maintained at all hazards. It must not be supplanted by Mundanism. It is equally imperative that within the nation Individualism should not be subordinated to Classism. Individualism has been the great impulse to progress and liberty. It is the very life-blood of modern civilization. Individual Rights, not Class Rights, should engage our concern and invite governmental protection wherever threatened. If we, Americans, abandon Individualism we have bartered away our birthright, we have cast aside that for which our forefathers were willing to die. The same is true of Individualism among nations. It must be maintained if the peoples of the earth are to possess patriotism, love of liberty and that generous devotion to national ideals which have made nations great and prosperous.

Peace and contentment are found in a nation where a free people live under just laws justly administered. So peace among nations will prevail when their conduct toward one another is governed by just laws and when they submit their controversies to an impartial judiciary which will decide them according to the immutable principles of justice.

To the achievement of this great good for the present and the future we should devote our thought and endeavor. To that end we should give our earnest support to Internationalism, a true Internationalism which is founded on a deep and abiding faith in Nationalism as the essential element of the present order. Today by common purpose and by united effort much may be accomplished. If we wait for a more propitious time, that time may never come.

VIII.

PROCEEDINGS

OF THE

JUDICIAL SECTION

The meeting of the Judicial Section was held in Jacob Sleeper Hall, Boston University, on Wednesday, September 3, 1919, at two o'clock in the afternoon.

Chairman Thomas C. McClellan, of Alabama, presided.

The Chairman:

It should be a great pleasure to all who are present that we are convened in the seventh annual session of this Conference of Judges. A very wide correspondence with the judges of the country discloses a growing, persistent interest in the organization; and two states (Florida and Wisconsin) have, during the year, made provision, through legislative action, to defray the expenses of members of their courts of last resort in attending the annual convention of the judges. In other states the governors, who have contingent funds subject to their disposal for public purposes, have favorably regarded or acted upon the plan originally proposed at Montreal in 1913, to stabilize the annual attendance of the judges of courts of final appeal by providing for the payment of expenses so incurred. This plan should be promoted in every legitimate way. The practical public benefits to be derived from the annual convention and association of the judges has already been demonstrated; and this measure of official sanction of the organization can but further confirm the consumate wisdom of the original suggestion. Most encouraging and gratifying responses to the brief address generally distributed by your Chairman (see page 636), were received from the judges. Their widespread concern for the continued success of the judicial organization justifies me in voicing the greetings of such of our brethren as are unable to be present.

Last April the attorney general of the United States expressed his very great appreciation of the invitation which, in your behalf, I extended to him to participate in our program today. On last Saturday he renewed his expression of that interest in a letter I then received, and stated that he was anticipating in a most pleasurable way the privilege of addressing our organization. Yesterday I received this telegram from him:

"I very much regret that a severe cold which has kept me in bed since Saturday will prevent my coming to American Bar Association meeting. Doctor forbids my making the trip. I am very sorry to disappoint your plan at this late hour and nothing but unavoidable illness would have prevented my being with you. (Signed) A. Mitchell Palmer."

I would be glad to have the authority of this Section to extend to the attorney-general the organization's regret that he cannot be present.

Orrin N. Carter, of Illinois:

I so move, that you extend to the attorney-general our regrets that he cannot be present.

It was so ordered.

The Chairman then presented Justice William Renwick Riddell, of Ontario, who delivered his address.

(*For Address, see page 639.*)

Upon the conclusion of Justice Riddell's address, Viscount Finlay, of Great Britain, delivered his address.

(*For Address, see page 659.*)

H. E. Randall, of Minnesota, then delivered his address.

(*For Address, see page 663.*)

In response to calls, Elihu Root, of New York, was presented and addressed the Conference.

(*For Address, see page 676.*)

The Nominating Committee, composed of Orrin N. Carter, of Illinois, John P. Briscoe, of Maryland, and Jefferson B. Browne, of Florida, reported the following nominations for the year 1919-20:

Chairman: Thomas C. McClellan, of Alabama.

Executive Committee: Charles A. Woods, South Carolina, Thomas W. Shelton, Virginia, and Andrew A. Bruce, Minnesota, and Charles A. DeCourcy, Massachusetts.

Adjourned *sine die*.

GAYLORD LEE CLARK,
Secretary.

NOTE.—On Friday, September 5, 1919, the Executive Committee of the Judicial Section accepted the resignation of Chairman Thomas C. McClellan who was, on that date, elected a member of the Executive Committee of the American Bar Association; and thereupon chose Charles A. Woods, of South Carolina, as his successor, and Robert R. Prentis, of Virginia, to succeed Judge Woods as a member of the Executive Committee of the Judicial Section.

ORIGIN, PLAN AND PURPOSE OF THE JUDICIAL SECTION.

Origin.

The Judicial Section of the American Bar Association was created at the most notable meeting of the Association, held in 1913 at Montreal. The organization resulted from the convention of a Conference of American Judges, held under the auspices of the Association's Committee on Uniform Judicial Procedure. This conference was attended by representations from the courts of last resort of twenty-four (24) of the forty-eight states, and representation from the United States Circuit Courts of Appeals, as well as from the Court of Appeals of the District of Columbia and the Supreme Court of Porto Rico. Among the active participants in the initial conference preceding the permanent organization of the Judicial Section, were many of the most distinguished jurists in our country. A list of them may be found in Volume No. 38 of the Proceedings of the Association, at pages 132-3. The Judicial Section was, to quote the law of its creation, "established for conference, discussion and interchange of ideas as to the duties and responsibilities of the judiciary."

Personnel.

Of those eligible to primary membership in the Judicial Section are "all federal and state judges of courts of final appeal in the United States who are members of the American Bar Association"; and, in certain contingencies, judges of less rank may participate in the deliberations of a single meeting of the body. The maximum number of possible members of the Judicial Section from the federal and state "courts of final appeal," as now constituted, is three hundred and twenty-five (325). The high judicial stations of those from whom the chief personnel of the organization is drawn and the objects and purposes to serve which it was created, characterize the organization as one of worthy dignity and of distinctly national scope.

This organization is the first of its kind ever undertaken in our country. Its five annual conventions have more than vindi-

cated the wisdom of its original conception and definitely foreshadowed its utility as an instrument to advance the science of applied jurisprudence. Its official heads, preceding the writer, have been Judges Orrin N. Carter, of the Supreme Court of Illinois, and William C. Hook, of the Eighth United States Circuit Court of Appeals. Among those who have taken an active interest in the meetings of the body and participated in its functions mention may be made of Hon. William Howard Taft, Hon. Elihu Root, Justices James C. McReynolds and Mahlon Pitney, and others of pre-eminence whose active interest emphasizes the organization's merit and public importance.

Design.

Membership in the body is an honorable association; and attendance upon its conventions affords an obvious opportunity for real public service of a distinctly judicial character that will inevitably exert an important, though unheralded, influence nationally as well as in the respective jurisdictions in which the attendants are commissioned. Furthermore, the thus afforded privilege and fellowship with officials performing the like service in their respective spheres of judicial trust throughout our country will necessarily expand the individual horizon and emphasize the thought, particularly forceful at this time, that the judiciary, in all its branches, federal and state, is a composite; that it is engaged in a common service directed to the same great end, and open to the same measures of iconoclastic attack:—with the personnel, now as heretofore, imbued with the patriotic motive to preserve the judiciary's worthy independence and to demonstrate its continuing right to deserve and receive the unqualified confidence and unreserved support of enligtened public opinion.

This organization offers to the judges, individually and officially, and through them to the respective sources of their trust and authority, a privilege and an opportunity that can now be afforded in no other practical way.

Consequent upon the unsatisfactory results that have attended the efforts to regulate judicial procedure through statutory provisions or systems (thereby directly restricting the courts in the exercise of a function distinctly judicial in nature, relation and application), the conviction generally obtains among those who

have given informed consideration to the subject that unrestricted rule-power should be coferred on the appropriate courts of last resort to originate and promulgate the rules governing judicial administration in their respective jurisdictions. No other agency of the governments is as thoroughly qualified to discharge the functions of providing the rules of judicial procedure as the courts, by which all such rules must be exclusively administered. "The courts can be trusted just as safely to say *how* the decision shall be arrived at as to say *what* the decision shall be,"—especially since an immediate effect of this plenary authorization would be to render readily available the skilled experience and judgment of the bar in formulating rules of procedure. With courts so authorized, an ever present power would be created to correct discovered deficiencies and to perfect the rules to accord with their design.

To bind the judicial departments, in matters of procedure, by statutory prescription often doubtful in phrase, purpose or effect, operates to emphasize and exalt *method* to the subordination of the substantial service to which the courts are dedicated, and results quite frequently in undeserved distrust of the judiciary upon which rests the duty to administer the rigid rule of the statute. When the courts of final resort are plenarily empowered to make and perfect the *methods* of procedure, the Judicial Section offers the ready medium through which to convene, in national deliberative assembly, the members of the courts so authorized, from which there will come an advised, conservative and preservative progress toward the perfecting of the methods of procedure that should obtain in the courts, including an highly desirable uniformity.

In view of the benefits to be derived from a complete, virile organization of the judges of the country, it is patent that all the judges of courts of last resort should give to the Judicial Section their best patronage, and that the states should provide funds to cover the expenses of their judges in attending the meetings of the Section, in order that this potential implement of public service may come into active operation and perform its expected great function.

THE JUDICIARY AND THE ADMINISTRATION OF JUSTICE IN THE PROVINCE OF ONTARIO.

BY

THE HONORABLE WILLIAM RENWICK RIDDELL, LL. D., ETC.,

JUSTICE OF THE SUPREME COURT OF ONTARIO.

[Upon receiving the invitation to address this Section of the American Bar Association, I prepared a paper on the above subject; but on conversing with a number of my American judicial brethren, I found that certain matters which I thought commonplace were really of much interest to them and *vice versa*. I therefore addressed the Section *extempore*—this paper contains the substance of my remarks, together with certain information brought out by questions sent to me by members of the Association.]

I feel particularly flattered by the invitation given me to address the Judicial Section of the American Bar Association, and equally, if not more so, by the request that I should speak of the judiciary of my own province. I accept in no missionary spirit but in that of fraternity and comradeship—I do not say or suggest that our methods are the better; but I do urge that as you and we and all the English-speaking peoples are one in essence, one in the feeling for justice and law, for the determination of rights on principle and not by the whim and caprice of judge or lord, so each branch of these imperial peoples may benefit by the consideration of how another has attempted to solve problems which are common to all and of the success obtained in the endeavor.

For more than a century our province has been permitted to develop its legal system in its own way, without interference on the part of the mother country, or any other.

For the two years after its organization, the Province of Upper Canada (now Ontario) had four Districts, and in each District a Court of Common Pleas, with full civil jurisdiction in the District. The English civil law having been introduced in 1792 by the first Act of the first Parliament of the province, it was early determined to introduce the English system of courts. Accordingly in 1794, an act was passed creating a common law court,

the Court of King's Bench, with full jurisdiction, civil and criminal, throughout the province and having its seat at the capital. That court was in 1837 and 1849 supplemented by a Court of Chancery and in 1849 by a Court of Common Pleas (with the same power and jurisdiction as the Court of King's Bench). These three were in 1881 combined with the Court of Appeal into a Supreme Court of Judicature now the Supreme Court of Ontario, with full jurisdiction, legal and equitable, civil and criminal.

First, however, I shall speak to you of the Bar; because, according to our system, no man can be a Judge of the Supreme Court of Ontario unless he has been at least ten years at the Bar of Ontario—he cannot be a Judge of the inferior courts unless he has been a member of the Bar of Ontario for at least seven years. In our country, no layman tries any case, no matter how small—a case involving five cents is tried by a Judge who has been appointed a Judge by the Government of the Dominion of Canada for life, and who has been at least seven years at the Bar of Ontario.

The Bar is a self-governing body: the courts do not call to the Bar of Ontario. Every five years (at the present time) the barristers in Ontario cast a vote for thirty men whom they desire to be Benchers, as we call them. Those thirty men, together with some *ex officio* members constitute a body corresponding to the senate of a university and in some respects to a board of governors. They have entire charge of all matters relating to admission to the Bar; they built the law school; they appoint the professors, they appoint the examiners; and when a young man or young woman has passed the examinations satisfactorily, that body calls to the Bar. Then some Bencher presents the successful candidate to a judge in court, as having been called to the Bar by the Law Society of Upper Canada; and thereafter he or she must be recognized by every judge in the Province of Ontario. Since 1797 no court in the Province of Ontario has had or has any power to hear anybody as a counsel or barrister unless he has been called to the Bar of Ontario by the Law Society of Upper Canada.

In addition to our barristers, we have also what are called solicitors, but ours is not entirely like the English system.

Nearly all our barristers are solicitors; practically all our solicitors are barristers. A young man will study law, and prepare himself for the examinations, and then when he has passed the proper examinations he gets a certificate of fitness from the Law Society; and upon that being presented to the court, the court admits him as a solicitor or, as you would call it, an attorney.

The Law Society of Upper Canada has full jurisdiction in the way of discipline over all members of the Bar; and it is exercised very freely—so that I may say, without undue self-laudation, we have a very respectable Bar in the Province of Ontario.

Now, as to the Bench. As at present constituted, we have one supreme court, the Supreme Court of Ontario, which has full jurisdiction, criminal and civil, equitable and legal, over all classes of cases, from the most trifling crime to the most serious crime, and from the most trivial civil claim to the most important. In practice the inferior crimes, practically all except those which are punishable with death—this statement is not literally accurate but is substantially so—are tried by the inferior courts, and, similarly, any civil case involving up to say five hundred dollars is brought as a rule in one of the inferior courts.

Each county or union of counties has its own County Court of limited civil jurisdiction; and it has its own Court of General Sessions of the Peace of criminal jurisdiction. And then there are Division Courts corresponding to your magistrates' courts in the United States, which deal with cases running up to $100. These are presided over by county court judges.

All appeals go to a branch of the Supreme Court of Ontario. The Supreme Court of the Province of Ontario has two branches—one is the High Court Division, a trial branch for the hearing and trial of cases; the other is the Appellate Division, which hears all appeals. But every judge of the Supreme Court has the same power and jurisdiction as any other; any judge may try legal or equitable issues, civil or criminal cases or sit on the hearing of an appeal from any judicial brother. An Appellate Court consists normally of five members but four constitute a quorum (except in criminal appeals). We have only one Court of Appeal for the Province of Ontario. From the

Court of Appeal of the Province of Ontario a very few cases are taken to the Supreme Court of Canada, and a smaller number of cases, perhaps not one per cent, taken over to the Privy Council in England—cases small in number although important in substance.

The practice in the Division Court is very simple indeed. It is laid down by a Board of County Court Judges, subject to the supervision of the Supreme Court Judges. The practice in the County Courts is, *mutatis mutandis,* the same as the practice in the Supreme Court. Accordingly the Justices of the Supreme Court have practical jurisdiction over all the practice in the courts of the Province of Ontario in civil cases. In criminal cases, the Dominion Parliament lays down the practice, and it is exceedingly simple in every particular. Hereinafter I shall speak of this in more detail.

Let me speak first of the practice in civil matters. While in early days the legislature occasionally passed practice statutes of more or less significance, even then the rules and practice were largely in the hands of the judges themselves. For nearly forty years the legislature has not interfered but left them wholly to the judiciary.

Speaking from observation and some experience, I would say that the plan of allowing the judges full control over the practice of the courts works admirably. It is flexible, easily altered or adjusted to meet new conditions and eminently conducive to speedy justice. If a rule works badly it can be changed without delay: if an exigency arises it can be met at once.

Again speaking from observance and experience, the end and aim of the rules of practice have been to give every litigant his rights irrespective of slips and mistakes, and dependent wholly upon the facts of each case without regard to technicality, or to legal astuteness or cunning. We do not regard the courts as merely a forum for the academic discussion of abstruse principles or simply a machinery for elaborating a complete or logical and advanced theory of law, but as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. We are a poor and a busy people, we cannot afford to waste either time or money.

CIVIL PRACTICE.

In civil cases in the Supreme Court and the County Court, there are two ways of bringing a matter before the court for adjudication. One is by what we call an Originating Notice. That is where the rights of parties depend upon a will or a contract, or any document in writing. In that case, instead of issuing a writ of summons according to the regular practice, some person interested in the determination of that question serves a notice of motion upon the other parties interested and moves it before a judge sitting in Court; the judges sit in court practically continuously, so that there is no difficulty in determining without delay the rights of parties under such a document. This proceeding may be taken before any dispute has arisen concerning the writing in order to prevent any future difficulty. I read the rules:

"600. The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, or any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin or heir-at-law of a deceased person, or as *cestui que trust* under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply by originating notice for the determination without an administration of the estate or trust of any of the following questions or matters:

(a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin or heir-at-law, or *cestui que trust*.

(b) The ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others.

(c) The furnishing of any particular accounts by the executors or administrators or trustees and the vouching (where necessary) of such accounts.

(d) The payment into the court of any money in the hands of the executors or administrators or trustees.

(e) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees.

(f) The approval of any sale, purchase, compromise or other transaction.

(g) The opinion, advice or direction of a judge pursuant to the Trustee Act.

(h) The determination of any question arising in the administration of the estate or trust.

(i) The fixing of the compensation of any executor, administrator or trustee.

"603. (1) Where any person claims to be the owner of the land, but does not desire to have his title thereto quieted under the Quieting Titles Act, he may have any particular question which would arise upon an application to have his title quieted determined upon an originating notice.

"604. Where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined.

"605. (1) Where the rights of the parties depend:

(a) Upon the construction of any contract or agreement and there are no material facts in dispute.

(b) Upon undisputed facts and the proper inference from such facts.

"Such rights may be determined upon originating notice.

"(2) A contract or agreement may be construed before there has been a breach thereof."

Where the motion is heard by the Judge, Rule 606 directs as follows:

"606. (1) The Judge may summarily dispose of the questions arising on an originating notice and give such judgment as the nature of the case may require, or may give such directions as he may think proper for the trial of any questions arising upon the application.

"(2) Any special directions, touching the carriage or execution of the judgment or order or the service thereof upon persons not parties, may be given as may be deemed proper."

A very great many contested and contentious questions are thus disposed of.

But the regular way of getting a matter before the court is by the issue of a writ of summons. This writ of summons is issued by the plaintiff or plaintiffs, as the case may be, and served upon those against whom a claim is made, the writ being endorsed with the cause of action. We have two kinds of endorsements. One kind, the special endorsement, is employed where the plaintiff seeks to recover a debt or liquidated damages in money and in a few other cases.

Rule 33 provides as follows:

"33. (1) The writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim,

where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest, and whether the interest be payable by way of damages or otherwise), arising:

(a) Upon a contract, express or implied (as for instance on a bill of exchange, promissory note, cheque, or other simple contract debt): or
(b) On a bond or contract under seal for payment of a liquidated demand; or
(c) On a statute where the amount sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
(d) On a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand; or
(e) On a trust; and also
(f) In actions for the recovery of land (with or without a claim for rent or mesne profits); and
(g) In actions for the recovery of chattels.
(h) In actions for foreclosure or sale."

When a writ, being specially endorsed, is served upon the defendant, the defendant if he wishes to defend must not only file an appearance, but with his appearance he must file an affidavit setting out that he has a good defence on the merits and also stating the grounds of his defence; if these grounds are not sufficient they can be struck out and judgment may be entered forthwith. If the alleged facts set out in the affidavit be sufficient to constitute a defence, then the matter goes down to trial, as in other actions: the endorsement upon the writ and the affidavit may if the plaintiff so desires, constitute the pleadings—there is no necessity for any more pleadings than these with a specially endorsed writ, but the plaintiff may, if he prefers, proceed as in other cases.

If the defendant, served with a specially endorsed writ does not enter an appearance, final judgment may be entered; if he files an appearance with the proper affidavit he may be examined as in other actions—the practice of examination will be explained later.

In the case of a mortgage and some other particular forms of action, there are also special methods of procedure that I need not dwell on.

In an action in which the writ is not specially endorsed the defendant enters an appearance but he does not put in an affi-

davit. A statement of claim is served by the plaintiff and in due time a statement of defence is served by the defendant. These statements of claim are simple statements in ordinary language of the facts upon which the plaintiff relies to entitle him to the judgment which he claims—not conclusions of law. So, in the statement of defence, the defendant sets out the facts upon which he relies to constitute a defence to the action, not conclusions of law. If he wishes to admit anything stated by the plaintiff he may admit it; if he does not admit any statement, it is taken as denied (in this differing from the English practice).

When the plaintiff sees the statement of defence, he may amend his statement of claim or file a reply. The defendant may amend his pleading, but no pleading is allowed after reply. The defendant may also, by way of counterclaim, set up any claim he may have against the plaintiff, whether sounding in damages or not: but the court may strike out the counterclaim if it be thought not convenient to try the issues at the same time.

We have also convenient methods of trying counterclaims by the defendant against the plaintiff and other persons—and also a third party proceedings to determine guaranty, relief over, etc.

Any party may move to strike out pleadings or for judgment on the pleadings, etc., but by reason of the simplicity of our pleadings this is not very often done.

Amendments of pleadings are allowed almost as of course at any stage even in the Appellate Division. Our rules in that regard are imperative not permissive—"shall" not "may."

"183. A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made, upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining the real matter in dispute, and the giving of judgment according to the very right and justice of the case.

"184. Non-compliance with the Rules shall not render the writ or any act or proceeding void, but the same may be set aside, either wholly or in part as irregular, or may be amended, or otherwise dealt with, as may seem just."

These amendments may be made in the proceedings before trial, they may be made at the trial, they may be made in the Appellate Division. Over and over again, in the Appellate Division in which I have the honor to sit, the objection has been taken, "The judgment does not follow the pleadings," and the answer

made: "Very well; we will amend the pleadings to agree with the facts." There may be other facts which would require to be proved under the amended pleadings or other evidence which a party might desire to adduce. If so, we call the witnesses before us in the Appellate Division, and have them examined there; or sometimes facts are allowed to be proved on affidavit.

If the facts are all before the court, we have little care for the pleadings and we care nothing for the "state of the record." Everyone will remember the wail of the technical judge when amendments were suggested—"Think of the state of the record." We care so little about the record that, in a great many cases, the amendments which are ordered to be made are not made in fact.

There is some danger in that course sometimes, if the case is appealed to the Supreme Court of Canada, because the Supreme Court of Canada often looks at the pleadings rather more strictly than we do; I cannot say what is done in the Privy Council, because it is thirteen years since I practiced there.

Again sometimes there is a plea of *res adjudicata;* but we have no real difficulty in such a case, because, if it is said that the judgment pleaded did not proceed upon the formal pleadings, but that the question that was really tried and disposed of was something different, we send for the original record and the original pleadings in that action; and we have the power to amend the pleadings at any time.

I know that sounds very terrible from the point of view of the pure lawyer, of one who thinks of nothing else but law; and indeed if the courts existed solely for the purpose of making good lawyers, pure lawyers' law, that might not be a wise method of procedure. I contend, however, that courts do not exist for the purpose of making good lawyers any more than a hospital exists for the purpose of making good doctors. If a medical student can learn to be a good doctor by attending the clinics in the hospital, well and good. In the same way, if a member of the bar may become a good lawyer by watching the proceedings in a court of justice, well and good. But the object of the court is to give the litigant his rights; and everything else must be secondary to that.

Proceeding now with our action at law. Every litigant must, as of course, file an affidavit, setting out all the documents which

he has in his possession, custody or control, having any bearing whatever upon the matters at issue in the action, or which have been in his possession, and stating when they were in his possession, and what has become of them; and he must produce these to the opposite party if the opposite party so demands. That we have found helps a very great deal in elucidating the facts of an action before it comes to trial.

Then there is another very useful practice—a practice which puts an end to at least one-third, possibly one-half, of all the actions brought. When by the pleadings it has been made manifest what the issues are, which are to be tried, either party may serve upon the other a subpoena requiring him to appear before a Special Examiner (who is an officer of the court), and submit to examination upon all the matters which are to be in issue directly or indirectly in the action. The examination is taken in shorthand and extended; and it may be used at the trial by the person who examines—it cannot, however, be used by the person who is examined. If he wants to tell anything to the jury or the judge, he may go in the witness box and tell it.

That system of compelling parties to put their cards upon the table (so to speak) has helped wonderfully in diminishing the number of actions tried, and in simplifying the actions when they are tried. The admissions of the defendant on the examination for discovery are put in and that will perhaps reduce the matters in issue down to one or two simple facts; whereas, otherwise, there might have been many facts to be proved.

In not a few cases the admissions of one or the other party show that there is no defence or no legal cause of action as the case may be: the party conceiving himself entitled to judgment on admissions may move before a judge in court for such judgment as he thinks he is entitled to.

Now, suppose the pleadings are complete and the case is to be tried, when and how is it to be tried?

The judges of the Supreme Court, every six months, lay down circuits for each of the judges in the High Court Division. Each county or union of counties has a county town, in which a court for the trial of actions is held, twice, four times, six times, eight times a year, according to the amount of business which is to be done. Some of the sittings are non-jury sittings, for the trial of

actions without a jury. Others are jury sittings at which actions are tried by jury, and also actions without jury.

Let me premise my subsequent statements by saying that we have no Constitutional Limitations in the Province of Ontario. The very word "constitution" means something different in the United States from what it means in Canadian or British nomenclature. With you the "Constitution" is a written document, containing so many sentences, words and letters: every man may read it, it is written and *Litera scripta manet.* With us, the constitution means something quite different. The Constitution of Canada is the constitution of the British Empire, of the mother country, of England; it is the body of principles more or less well defined, upon which the people believe they should be governed. It is not something in black and white—you can talk about it, write about it, argue about it—but it is not a document for interpretation by court or lawyer. With you, to say that anything is "unconstitutional" is to say that it is illegal however wise and beneficial: with us, to say anything is "unconstitutional" is to say that it is legal, legally binding, but unwise and improper.

Since we have no Constitutional Limitations, we can govern ourselves and do govern ourselves without any more regard to the "wisdom of the ancestors" than we think it deserves. And the legislature many years ago, passed an act placing it in most cases entirely in the hands of the judge whether a case should be tried with or without a jury.

Now, that sounds appalling! Think of that "Palladium of Liberty," the jury, being swept out of existence by the ruthless hand of a judge appointed for life, for whom the people cannot even vote, and whom they cannot displace—we have no recall in our country. This is what happens:

A party who wishes his case tried by a jury files a jury notice—the other side may move to strike it out. It will be struck out in Chambers, if the judge sitting in Chambers thinks it is a case that ought not to be tried by a jury upon the face of it. Usually, however, a different course is pursued and the matter is left to the trial judge: I go circuit, say, as I have done many times, and hope to do again. The Records containing the pleadings are laid before me; I go through the records one by one, and

determine which, if any, of the cases for which a jury is asked should really be tried with a jury. Counsel may be heard; and as a rule in a very few minutes we have determined in which cases a jury is proper. In all the other cases, the jury notices are struck out, and they are placed at the end of the list, with the cases to be tried without a jury. (This applies only to civil cases.)

There are still a very few cases where a party has the right of trial by jury.

Moreover, the judges have the power to strike out a jury at any stage in the case, until such time as the verdict of the jury has been accepted.

And notwithstanding what may have been done by any other judge in the way of striking out a jury notice, and notwithstanding what the parties may desire, the trial judge may try any case with a jury which he thinks should be so tried.

There have been very strong grounds urged for the retention of the jury trial. Such a method is doubtless good in some cases. I cannot, however, agree with Thomas Jefferson in his view that cases ought to be tried by a jury in order to teach the juries and therefore the people at large, law. I do not think that the court is a place for teaching law at all. More than that, in 999 cases out of a thousand, in matters which actually arise in the life of a juryman, he does not need any law, or any rule of guidance except plain common sense and common honesty. Such a knowledge of law as he can acquire by trying a case as a juryman, does not help the ordinary individual very much.

Moreover, I protest against teaching jurors or the body of the people anything at the expense of two litigants. It might be just if the country should pay the expense of the litigants and the lawyers: if business schools of that kind are needed they ought to be kept by the people, and not paid for by the litigants.

There are other objections against our system which might be urged. It may be that the people of a country have not come to that state in evolution or devolution, whichever you like—I am not concerned with the words—I mean such a state of sentiment as that they will approve of the trial of most cases by judges instead of by juries. There are some states, there are some places, Populist and otherwise, in which the people think they ought

to have their cases tried by a jury, even though they are not or may not be tried so well by a jury. Now, if the people are not satisfied to have cases tried by a judge instead of by a jury, they ought to have them tried by a jury. The most important thing is to do justice and right between man and man, to do right and to do justice according to law. There is, however, the second thing, and not very far behind this in importance, which is that the parties shall believe they are getting justice; they shall believe that their case is being properly tried; they shall believe that justice has been done; they shall leave the court satisfied that such is the case—*placati*, as Lord Finlay put it this morning.

Our people in Ontario have, through a course of evolution, come to the view that, after all, a jury is not necessary in most cases; they have come very much to the mind of the French-Canadians, who, shortly after the conquest by British of our beautiful country in 1759-60, were never tired of expressing their wonder that their businesslike, common-sense, fellow-colonist, the Englishman, preferred to leave his rights to the determination of tailors and shoemakers rather than to that of his judges.

Even if a case is tried by a jury, in not one case in ten—I am quite within the mark—is the jury allowed to give a general verdict. What we do is this: We write out questions for them to answer in writing, as to the facts upon which we conceive the determination of the action will rest. For instance, in a negligence action, it would run something like this: 1. Was the accident in question caused by the negligence of the defendant? 2. If so, what was the negligence? Write out carefully and fully every act of negligence of which you find the defendant guilty, which caused or assisted to cause the accident. 3. Notwithstanding the negligence of the defendant, could the plaintiff by the exercise of reasonable care have avoided the accident? And then there may in some cases be a number of other questions; and in any case the jury find damages. A jury is not allowed to give a general verdict—they have nothing to do with the costs—they answer the questions put to them and these only. The judge accepts the findings of fact and enters the judgment which the answers to these questions entitled the parties to—*i. e.*, not according to his own view of the facts, but according to the facts as found by the jury. If the judge is not satisfied with the

finding of the jury, he has no power to order a new trial: an appeal must be made to the Appellate Division. Sometimes the findings of a jury are so outrageous that they ought not to be allowed to stand; but the trial judge has no power to set them aside; that is one of the functions of the Appellate Division.

The result is there is not one case in one hundred in which there is a general verdict by a jury, except in cases of slander or something of that sort.

The percentage of cases tried by a jury is constantly diminishing—the last time I had occasion to look into the matter at all closely, I found that about 20 per cent were so tried in the Supreme Court, about 15 per cent in the County Court and not one-fifth of one per cent in the Division Court. While technically there is an appeal from the action of a trial judge in striking out the jury, I have, in more than thirty years' experience, known of only two appeals being actually taken on this ground, both of them unsuccessful—I know of one case, however, in which an appeal taken on other grounds succeeded, and the Appellate Court directed the jury notice to be restored.

In an address before the Illinois Bar Association, May 28, 1914, I used the following language in reference to our practice:

"The saving of time—and wind—is enormous. The opening and closing speeches of counsel to the jury and the charge of the judge are done away with; in argument there are very few judges who care to be addressed like a public meeting and quite as few who are influenced by mere oratory—all indeed must *ex officio* be patient with the tedious and suffer fools gladly. Vehement assertion, gross personal attacks on witnesses or parties, invective, appeal to the lower part of our nature, are all at a discount; and in most cases justice is better attained, rights according to law are better ensured. Moreover during the course of a trial a very great deal of time is not uncommonly wasted in petty objections to evidence, in dwelling upon minor and almost irrelevant matters which may influence the jury, wearisome cross-examination and reiteration, etc., all of which are minimised before a judge."

As regards appeals, we have not two courts, as you have in most of your states. Our Supreme Court of Ontario is, in one of its Divisions, the Trial Court, and in the other of its Divisions, the Appellate Court; and any one of the judges of the Supreme Court

may sit in either Division. Today a judge may be sitting in the Appellate Court—presiding, for that matter, in the Appellate Court; tomorrow he may be trying a damage action, and the next day a murder action. Any judge whether chief or puisne justice of the Supreme Court has precisely the same function as any other judge.

There being only the one court, there is no necessity for any formal proceeding to bring the matter up to the Appellate Division. The appellant brings up the record used at the trial: that record is brought up in all its hideous irregularities, if you will, all blotched over with amendments. That is brought up and placed before us—a typewritten copy of all the oral proceedings at the trial is furnished to each of the judges—the original documents are brought up and placed before us. We are precisely in the same position as the trial judge, so far as the written documents are concerned. We have the disadvantage of not seeing and hearing the witnesses; but the trial judge as a rule where his finding depends upon the credibility of the witnesses expresses his opinion; and while we are not bound by his findings, we have it for our guidance.

An appeal must be brought within thirty days after the trial.

If a case is too long on the list, it is a common practice for the Appellate Division to send for counsel and ask why the case is not heard, brought on for argument. In general, if an appeal is not heard within three months of the trial, there is something wrong somewhere; and if a case is not tried within six months of the writ being served, there is something wrong.

Of course, witnesses will die, and accidents will happen—witnesses will leave the country. These are particular instances; but speaking generally, a case ought to be tried within six months after the action is brought, and it ought to be through the Court of Appeal, and the whole action finally settled within a year.

I shall give you a concrete example. In the very first case that I tried when I was raised to the Bench thirteen years ago, which went to the Privy Council, the writ was issued in April in one year: it went through the trial court, through the Appellate Courts and the Judicial Committee of the Privy Council in Westminster, and was disposed of in June of the following year. That is fifteen months to go through the trial court, the

Appeal Court, the Supreme Court of Canada, and the Judicial Committee of the Privy Council.

I do not wish you to understand, or to think that I am trying to give you the impression, that we are marvellously clever in Canada; but this I do urge upon you:

We are a poor people, we are a busy people, we have a big country to develop, we are developing and we must develop it with considerable rapidity. We have no time to waste in technicality in pleadings and such like—we try to save both time and money for all litigants, and to give them their rights and dues within as short a time as possible. As we do not sell, neither do we delay justice.

It is not altogether the practice alone that makes a difference—give me even a complicated practice, with a judiciary possessing the instinct of right and justice and the desire to do business and get on with the work, and I will give you a court which will do a great deal better than a court with the very finest practice, the most modern improvements, but with the judges technical, insisting upon the letter rather than the spirit, form rather than substance, and more troubled about the importance of their position than they are about the importance of the litigant getting his rights.

But there can be no doubt that a simple non-technical and flexible practice makes for justice; and other things being equal it is more advantageous for the people at large, the litigant, the lawyer and the judge himself than the technical, intricate, refined practice which prevails in some jurisdictions which is more concerned with the way in which the lawyer puts things on paper than with the litigant having his rights according to the facts.

Criminal Procedure.

I may be permitted to repeat here what I said to the New York State Bar Association, January 20, 1912:

"At the conquest of Canada by the British, 1759-60, the English criminal law, both substantive and adjective, was introduced by the conquerors, although (with the exception of a few years) the French-Canadians were permitted to retain their own law in civil matters. The English criminal law continued to prevail except as modified by provincial statutes—and these statutes in general closely followed the legislation in the mother

country. This statement also applies generally to the Provinces of Nova Scotia and New Brunswick. Accordingly, at confederation in 1867 the criminal law of all the confederating colonies was almost identical—while the civil law of Lower Canada (Quebec) was markedly different from that of Upper Canada (Ontario), Nova Scotia and New Brunswick, the Lower Canadian law being based upon the Custom of Paris and ultimately upon the civil law of Rome; while that of the others was based upon that of the common law of England. The British North America Act, which created (1867) the Dominion of Canada, gave to the Parliament of the Dominion jurisdiction over the criminal law, including the procedure in criminal matters. The provinces, however, retained jurisdiction over the constitution of the Courts of Criminal Jurisdiction.

"For some years there were statutes passed from time to time amending the criminal law; and at length Sir John Thompson who had been himself a judge in Nova Scotia, and was Minister of Justice of Canada, brought about a codification of criminal law and procedure. He received valuable assistance from lawyers on both sides of the House; and the Criminal Code of 1892 became law. This with a few amendments made from time to time is still in force.

"The distinction between felony and misdemeanor has been abolished, and offences which are the subject of indictments are 'indictable offences.' Offences not the subject of an indictment are called 'offences' simply. Certain offences of a minor character are triable before one or two justices of the peace as provided by the Code in each case. In such cases there is an appeal from a magistrate's decision adverse to the accused to the County Court judge both on law and fact; or the conviction may be brought up to the Appellate Division of the Supreme Court on matter of law.

"Cases triable before justices of the peace are (for example) resisting the execution of certain warrants, persuading or assisting an enlisted man to desert, challenging to fight a prize-fight or fighting one, or being present thereat, carrying pistols, selling pistols or air guns to minors under 16, pointing pistols, stealing shrubs of small value, injuring Indian graves, buying junk from children under 16, etc.

"But offences of a higher degree are indictable.

"If a crime, say of theft, is charged against any one, upon information before a justice of the peace, a summons or warrant is issued—and the accused brought before the justice of the peace. In some cases he is arrested and brought before the magistrate without summons or warrant; but then an information is drawn up and sworn to. The justices of the peace are appointed by the Provincial Government and are not, as a rule, lawyers.

"Upon appearance before the justice of the peace, he proceeds to inquire into the matters charged against the accused; he causes witnesses to be summoned, and hears in presence of the accused all that is adduced. The accused has the fullest right of having counsel and of cross-examination, as well as of producing any witness, and having such evidence heard in his behalf as he can procure. All the depositions are taken down in shorthand or otherwise, and if in long hand signed by the deponent after being read over to him.

"After all the evidence for the prosecution is in, the magistrate may allow argument, or he may *proprio motu* hold that no case has been made out—in which case the accused is discharged—or he may read over aloud all the evidence again (unless the accused expressly dispenses with such reading), and address the accused, warning him that he is not obliged to say anything, but that anything he does say will be taken down and may be given in evidence against him at his trial, and asks "Having hear the evidence, do you wish to say anything in answer to the charge?" Then if desired by the accused, the defence evidence is called.

"If at the close of the evidence the magistrate is of opinion no case is made out, he discharges the prisoner, but the accused may demand that he (the accuser) be bound over to prefer an indictment at the court at which the accused would have been tried if the magistrate had committed him.

"If a case is made out, the accused is committed for trial with or without bail, as seems just, the witnesses being bound over to give evidence.

"Police magistrates are appointed for most cities and towns, who are generally barristers; these have a rather higher jurisdiction than the ordinary justice of the peace; in some cases with the consent of the accused.

"The courts which proceed by indictment are the Supreme Court of the Province and the General Sessions.

"The Supreme Court can try any indictable offence; the Sessions cannot try treason and treasonable offences, taking, etc., oaths to commit crime, piracy, corruption of officers, etc., murder, attempts and threats to murder, rape, libel, combinations in restraint of trade, bribery, personation, etc., under the Dominion Elections Act.

"Within twenty-four hours of committal to gaol of any person charged with any offence which the Sessions could try, the Sheriff must notify the County Court judge (who acts as judge in the Sessions) and with as little delay as possible the accused is brought before the judge. The judge reads the depositions, and tells the prisoner what he is charged with and that he has the option of being tried forthwith before him without a jury or

being tried by a jury. If the former course is chosen, a simple charge is drawn up, a day fixed for the trial and the case then disposed of.

"If a jury be chosen, at the Sessions or the Supreme Court (Criminal Assizes), a bill of indictment is laid before a grand jury (in Ontario of thirteen persons) by a barrister appointed by the Provincial Government for that purpose. The indictment may be in popular language without technical averment, it may describe the offence in the language of the statute or in any words sufficient to give the accused notice of the offence with which he is charged. Forms are given in the statute which may be followed. Here is a sample:

"'The Jurors of Our Lord the King present that John Smith murdered Henry Jones at Toronto on February 13th, A. D. 1912.'"

"No bill can be laid before the grand jury by the crown counsel (without the leave of the court) for any offences except such as are disclosed in the depositions before the magistrate; but sometimes the court will allow or even direct other indictments to be laid.

"The grand jury has no power to cause any indictment to be drawn up.

"We do not allow an examination of the proceedings before the grand jury—there is no practice of quashing indictments for irregularities before the grand jury, insufficiency of evidence or the like. The grand jury is master in its own house; it may call for the assistance of the crown counsel or proceed with investigations without him, and no shorthand or other notes are taken of the proceedings, the grand jurymen are sworn to keep 'the king's secrets, your fellows' and your own.'

"Upon a true bill being found, the accused is arraigned; if he pleads 'not guilty' the trial proceeds.

"He has twenty peremptory challenges in capital cases; twelve if for an offence punishable with more than five years' imprisonment, and four in all other cases—the crown has four, but may cause any number to stand aside until all the jurors have been called.

"I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case—and I have never but once heard a juryman asked a question.

"In case of conviction, the prisoner may ask a case upon any question of law to be reserved for the Appellate Division or the judge may do that *proprio motu*. The Appellate Division may also direct a new trial upon the ground that the verdict is against evidence; but I have never known that to be done.

"No conviction can be set aside or new trial ordered even though some evidence was improperly admitted or rejected, or

something was done at the trial not according to law or some misdirection given, unless, in the opinion of the Appellate Division some substantial wrong or miscarriage was thereby occasioned at the trial. If the Appellate Division is unanimous against the prisoner, there is no further appeal; but if the court is divided, a further appeal may be taken to the Supreme Court of Canada. I have never known this to be done but once.

"A wife or husband is a competent witness in all cases for an accused. He or she is compellable as a witness for the prosecution in offences against morality, seduction, neglect of those in one's charge and many others. The accused is also competent, but not compellable in all cases. If an accused does not testify in his own behalf, no comment can be made upon the fact by prosecuting counsel or the judge.

"No more than five experts are allowed on each side.

"I have never known a murder case (except one) take four days—most do not take two, even with medical experts."

And if a murderer is not hanged within a year of his deed he may properly complain of being deprived of his rights under *Magna Charta*—"We shall not delay justice" was the king's promise.

I venture to hope that some of my brother judges in this great Republic may derive some benefit from what I have said.

Let me repeat, I am not a missionary nor do I urge any change in any system of practice but my own—I only state facts as they are within my knowledge in the hope that they may not be wholly without benefit to others.

I cannot close without expressing my gratitude for the illuminating judgments of many of the judges of the United States and State courts which have cast a ray of light over many a dark path and assisted us Canadian judges to do justice according to law.

And I feel deeply the cordiality with which you have received me and my message—I am wholly confident that you and we must remain in friendship and harmony as our countries have for more than a century—and that our sympathy with and affection for each other must increase as we know each other better.

ADDRESS

OF

VISCOUNT FINLAY,

EX-CHANCELLOR OF GREAT BRITAIN.

I am sure that we have all listened with very great interest to the address by Mr. Justice Riddell. He has touched on points of interest to everyone who has anything to do with the legal profession; and I think that every one of us must have been struck by the strong common sense that ran through all his remarks.

I have very little to add by way of supplement to that address. There are only three points on which I should desire, by your kind permission, to say a word.

The first is as to the mode of selecting judges. I hope it is not professional partiality which leads me to believe that the men at the bar are the best judges as to who would make a good judge. The professional opinion of his fellows, you will find, is almost inevitably right as to what a man's qualifications are for the bench.

I am not suggesting that the appointment to the bench should be by vote of the bar. I think that mischief might arise if any such procedure were adopted. But what I do say is that I think that whoever has the power of appointing judges, if he is wise, will take steps through the ordinary channels of information, as it has been put, to ascertain what is thought of the man, any particular man, whose name occurs as a possible appointment, by those with whom he is in daily and friendly rivalry at the bar.

I am quite sure that everyone who has been concerned in the appointment of judges will recognize that no more effective help can be had than by finding out what those who meet him every day in court think of him and his qualifications for the bench.

The second point on which I wish to say a word is this: It is to my mind absolutely essential for the efficient administration of justice that when a judge has been appointed he should have security of tenure. It seems to me that it would be fatal to the independence of the bench, it would be fatal to the administration of justice, if you had either appointment by election with a

short term of office, or a power of recall vested in those who appointed, whoever they were, because they did not happen to like the decisions which the judge made.

I am perfectly certain that the bar would produce many men who would defy any danger of that kind, and give judgment as they thought right. But it is a most mischievous thing to introduce an element which tends to sap the independence of the bench.

We had it at one time in England. That was in the days of the Stuart kings, when the judge who made a decision which was not satisfactory to the king was promptly sent off the bench and had to return to his practice at the bar. Since the Revolution, however, we have given in England fixity of tenure to the judges; that is to say, they can be removed only on a vote of the Houses of Parliament, who of course will not pass such a vote unless there is some very grave reason for it. That I regard as the great security of the bench in England, in the discharge of their high duties.

I am speaking, of course, of the judges of the Superior Courts. The dealing with the county court judges rests with the Lord Chancellor, who has the power in any extreme case to take the necessary measures, if such a case should ever happen of anyone being guilty of misconduct in his office as a county court judge. In the case of the Superior Court—and I think that is the model that we ought to aim at—it is the law that the judges are there until there is a vote of the Houses of Parliament for their removal, on which they may be removed by the Crown.

Now, gentlemen, I think that that independence of the bench is the very keystone of our liberty, of our true liberty. You must have the law as the test of what is right, and if you are to get good and sound law you must have judges who are not only learned, and who are not only able, but who are also independent and not subject to any undue pressure.

I observed that the remarks made by Mr. Justice Riddell with regard to trial by jury excited very great interest among you, an interest which I shared. I dare say most of you know the remarks of a very brilliant English judge, Mr. Justice Maule. When he was asked why trial by jury existed, he said that the real reason was this: That some cases can only be decided by tossing

up, and that it is more decent that a jury should toss up than a judge. Well, that may be one reason.

I think there are other and better reasons for the existence of trial by jury. It is perfectly true, as was said by Mr. Justice Riddell, that it is all important in the administration of law, not only that the right thing should be done, but that the litigants and the people generally should have confidence in the way in which it is done. And there are many cases in which it is highly desirable that there should be a trial by jury. I suppose no one would, for an instant, argue against trial by jury in criminal cases. In such cases you would not, unless under the most special and extraordinary circumstances, substitute trial by judges alone for trial by jury. It is highly desirable that in criminal cases, and in all cases which partake of those elements which exist in a criminal case—I speak of actions for assault, actions for libel, a variety of cases of that kind—the judge should have the assistance of a jury, so as to bring to bear, on a small scale, "the common sense of most" upon the particular case.

Of course, the glory of the English legal system has always been that it kept the facts and the law separate. Nothing would be more mischievous than that the law should not be left to the judge.

Wonder has sometimes been expressed that the ancient Greeks, with their wonderful genius and acuteness of intellect, did not produce a system of jurisprudence that was worthy to be mentioned in the same breath with the system of jurisprudence which we owe to the Romans. The explanation is a very simple one. They had the bad habit of leaving the whole law, facts and law, to the jurymen. The result was that you never got any settled maxims of law evolved. For that reason, I am sure we all absolutely agree with what Mr. Justice Riddell said as to the absolute necessity of leaving it to the jury to find the facts. I do not say that it is essential that in every case the questions should be so framed that only the facts are put to them, but the jury should be told by the judge what the law is, and they are bound by their oaths to take the law from the judge, and in finding out how the law applies, it is for them to find the facts, and then upon the facts to return their verdict in accordance with the law as stated by the judge.

Now, gentlemen, the most splendid tribute I think ever paid to trial by jury was by the historian Hallam, where he makes what always seemed to me a most striking comparison. He said that the verdict of 12 men in court is like a fountain of living water springing up in a wilderness. Amidst the dusty technicalities of the law, you have, as it were, the living water lapping up, in the verdict coming from men who, free from technicalities, accepting the law from the judge, return a verdict according to their conscience, upon the facts of the case and the evidence which is before them.

Of course, there is a great deal of difficulty always in keeping absolutely separate the law from the facts. If a number of complicated questions are left to a jury, they are apt to get confused. But the principle must ever be kept in view, that the judge lays down the law, that the jury are bound to take it from him, and that the function of the jury is to answer as to what the facts are.

I remember perfectly well a very great judge, Lord Bramwell—he was best known as Baron Bramwell, but he afterwards became a peer, and that title by which we all love to recollect him, Baron Bramwell, became superseded by the title of Lord Bramwell, which is much more commonplace. When he was sitting in the House of Lords, Lord Bramwell said that on one occasion when at the bar he was contending for some rather severe construction of a covenant in a lease, and he was asked by the judge, "How can you think that any man would ever enter into a covenant so onerous as that which you say this is on its legal construction?" Lord Bramwell said: "The answer I made was, 'My Lord, the party entering into that covenant, no doubt trusted to that natural court of equity, the jury, to see that it did not press too hardly upon him.'"

That might be a little irregular, but a certain amount of that sort of thing goes on, and it tends a little, no doubt, to relieve sometimes the creaking machinery of the law.

I have said the very few words that I proposed, upon all the points that occur to me; and sensible that much business lies before you, I will not further occupy your time; but I thank you for the courtesy with which you have received me.

ADDRESS

OF

HENRY E. RANDALL,

OF MINNESOTA.

When I saw the printed program of the Judicial Section, it seemed to me that the arrangement of the Chairman was in a measure a very wise one. That is, that the Attorney-General of the United States and himself should precede me on the program, and that I should have the duty of emptying Jacob Sleeper Hall. That program has been upset through the regrettable illness of the attorney-general, and through the fortuitous, I may say the fortunate circumstance, that Senator Root just entered the hall, and will follow me; so that you cannot leave Jacob Sleeper Hall until I am through.

When I listened to Judge Riddell, and heard his masterly presentation of the practice of the law in the Province of Ontario, I wondered that such things could be.

I have been the editor-in-chief of the West Publishing Company for nearly twenty years. For thirty-two years I have been more or less engaged in reporting the decisions of all the courts of last resort of this country; and, believe me, I have read probably more decisions than any judge here present.

I do not say that I remember them all, but I remember enough to point the contrast which Judge Riddell presents between the practice which obtains in his favored Province of Ontario and that which obtains in this country, now consisting of forty-eight states with a super state, and every legislature busy every two years at least, and sometimes every year, in telling lawyers how to practice law.

I suppose it is not yet within the bounds of reasonable hope that we shall get back to some sensible system like that pointed out by Judge Riddell as obtaining in Canada, where the judges have some power to determine the sensible thing to do to push on the administration of justice.

You take the National Reporter system, consisting of all the reports of this country, you take the digests and the encyclopedias of law which expound all the decisions that are handed down

in attempting to administer these statutes that the legislatures pass for the purpose of forwarding the administration of justice, and you will find that a large proportion of those cases is given up to telling lawyers how to get into court, and how to stay there; how to prevent being thrown out on a demurrer, or on a motion to the trial court; and then the same tedious process is gone through again on appeal, in determining how the statutes shall be construed, so that the briefs shall be properly written, the assignments of error shall properly be filed, so as to get into the Supreme Court, in order ultimately to get the law administered, to get substantial justice between two litigants.

This is off the record. It is not a part of the remarks I had intended to make; but I cannot help expressing myself from my observation and from my knowledge.

I see before me faces of men who have grown gray on the bench, trying to understand and interpret the statutes, and keep peace with the lawyers who appear for a statute or against it; and I hope before their time is passed there will be some relief afforded in this situation.

What I wanted to talk to your honors about particularly was a question that you are all familiar with, and which I, in my position, have to face and work with all the time; namely, the decisions, the reports. Do you know that there are filed and published substantially every year by the higher courts of the country, the Appellate Courts—I am not speaking of the trial courts—upwards of 22,000 cases, some of them of the utmost importance to litigants; and, in the progress of the law, a great majority of them of the utmost importance; and that the Bar has got to know about them, has got to have access to them; and that they are not only published but they are digested, they are written about, they are commented upon, and the lawyer has got to determine what applies to his case, and find out his needle in the big haystack.

When I first came to the reporting business thirty years ago, there was contending, as I suppose there always has been contending in the development of the law, in our little staff of editors, the question as to whether we should report the cases and write the headnotes—the syllabi, if you please—from the point of view of the general principles, or should bring out the facts of

the case. I was an ardent advocate, from my experience at the Bar, of the theory that there wasn't very much difficulty in knowing the general principle of the case; nobody had any question about the Twelve Tables of Rome as finally written, nor about the Fourteen Points at a later period in history; but there was a good deal of difficulty in knowing which one of the Ten Commandments or of the Twelve Tables applied to a particular case; and I understand from reports in the newspapers, that there is still difficulty as to knowing which of the Fourteen Points applies to this difficulty or that difficulty, and what that Thirteenth or Fourteenth Point really means when it is applied to an actual case in hand.

So my duty as editor-in-chief of the West Publishing Company, and as reporter—and I am proud to say that our work in that behalf has been followed by the official reporters—has been to present the facts of the case, as well as the general principles; and if, in the heading, or in the reporting of the case, or bringing out the points in the syllabus, the Judge goes no further than to lay down the general principle which seemed to be in judgment and was really involved, we state the general principle; but if the facts are brought out, and they can be found in the record, we try to state the facts. I am a believer in the concrete.

I am reminded of a story that a friend of mine told me, when I told him that I was going to address this meeting. He said there was a certain man who got up before a gathering of experts, and after rambling on for a little while, one man in the audience got up and said: "Please come down to the concrete; we have all got concrete heads."

Now I took that story very much to heart. I shall try to be as concrete as your heads.

And first, nobody knows better than I do the difficulty of this whole problem of the case law system; but it has got to be faced, and it has got to be handled; and it is between you gentlemen on the bench and the reporters, speaking now for the whole body of reporters, and there are forty-eight of them besides myself in the different states, not counting Mr. Knaebel of the Supreme Court of the United States. It is up to us to handle it in such a way that it shall be least burdensome to an already overworked profession.

It is the fact—I suppose you all know it is the fact—that old cases are interesting, but they are not so much referred to as the new cases. You will be surprised to learn that since the National Reporter system started—it is now 35 to 40 years old, a long period as we count time in this country, but a short period in the history of the Republic, comparatively speaking—it will surprise you to know that in almost every state, where judges or lawyers seek access to outside reports, the big majority use only the National Reporter System and do not go back further than that system, now 35 to 40 years old.

Of course, in his own state, the lawyer has the official reports of his state on his shelves, and he digs back as far or as long as he chooses; but ordinarily, when there is a question that turns on knowing the law of another state, the National Reporter System satisfies him.

The reason for this, and it is a very reasonable reason too, is that men have found that they cannot handle all, they cannot go back all the way, and they take the thing which is nearest to their hands, they take the law as it is written, and as it comes now in a fresh stream every year, 22,000 cases more or less, restating the old cases; and there is no need, except in grave emergencies, to go back any further. The case law problem is curing itself. But while it is curing itself, it behooves us as judges and reporters to watch our steps and be careful.

A few years ago I served on a special committee of the Association on the reporting of decisions. Thomas H. Reynolds, of Kansas City, was the very able Chairman of the Committee. We had a mandate to study the question as to how to keep down the reports, how to keep down the mass of decisions which was piling up, and which lawyers thought with some reason would overwhelm them, so that they couldn't dig from under.

Mr. Reynolds, through his committee, studied the question most carefully, and he himself made a very illuminating report. I suppose most of you have read it. In pursuance of that report, we made certain recommendations to all the judges of the Appellate Courts of the country. I presented the memorial to the Supreme Court of Minnesota and to some of the federal judges in Minesota. The sum and substance of it was that the remedy, so far as there is a remedy, is in the hands of the judges. It is in the hands of

your honors, namely, to keep down the opinions as much as it is humanly possible.

I made certain investigations for the purpose of that committee report, some of which you may have seen published or referred to; but it was very interesting and illuminating, and I will take up your time in reading one or two extracts.

The length of opinions was found to have increased in the 20 years in which I have the record between 1894 and 1914—the length of the average opinion increased substantially 30 per cent.

We can figure out why this should be. During those 20 years the typewriter and the stenographer had come into vogue. The judges of this country, almost to a man, are overworked. The Appellate judges certainly are. It is human to take the shortest cut. It is easier to write a long opinion than a short one. I have not written opinions myself, but I have written headnotes for thousands of them, and I know it is much easier to write a long headnote than a short one. You take a stenographer, and talk into her ear, and she reproduces what you say, and it is very easy; and if you blunder a little, you can go back and paraphrase it, and before you know it you have piled up words amazingly.

Nobody can be blamed for that. It is not possible for judges to go back and concisely express themselves with pen and pencil. There were some courts, from the investigations that I made, that had increased the length of their opinions 50 per cent.

We urged upon the judges in this memorial that this was an evil that they ought to study carefully to avoid; and as a matter of fact—I think it is a curious fact that judges sometimes listen to lawyers, and sometimes listen to memorials—I think they have taken it to heart, because in my investigation of the output of the cases for the last four years—in two of the western reporters it was found that, whereas the record in 1913 showed the average length of the opinion (and this by the way is in the reporters, the large double column page) was 1.88 pages in 1918 it had run down to 1.80 pages. Another reporter showed in 1914 two pages to a case, and in 1918 it had run down to 1.71. This shows that we are on the right track, and I simply come here now, redoing the work which Mr. Reynolds did so well in his admirable report, in urging upon any judge who is here present, and any judge that you gentlemen of this body can influence, to keep on in this good work—that they are on the right track.

There are other duties which a judge can perform. I find from my investigation, from a very careful comparison of a large mass of cases, that some of the judges unduly quote from previous reports of their own state which are accessible to every lawyer coming before that court. I have taken certain cases up with judges who sent in their opinions where they have quoted at length, and I have asked them whether or not they did not think it would be wise for them simply to say that the case of so and so held so and so; "and refer to the report."

After thinking it over—they are mostly all reasonable men—they have refiled their opinions, cutting out the quotations. I think this is in the right line.

You would be appalled, some of you gentlemen of the eastern courts and especially of the Massachusetts court, if you could read some of these opinions. The Massachusetts Supreme Judicial Court is—and I suppose you will all admit it—not only in the weight and value of its decisions, but in their conciseness, the simplicity with which the language is expressed, almost a model tribunal. You will find very few quotations of any length.

Nobody, least of all a lawyer, will deny that an apt quotation from a ruling on determinative case, is the most intelligent way of presenting the point; and I would not think of urging that quotations should be done away with altogether; but when you come to string together a whole array of quotations, two or three pages as I have seen it done, simply with the comment of the judge filing the opinion that this seems to be all right, and sometimes he doesn't say anything, a reporter has to deduce what he is driving at. The quotations, of course, have introductory phrases, and concluding phrases, that have nothing to do with the point that he is deciding; and it is difficult for the reader, and difficult for the reporter, to find what he really is deciding and what he wants to rule.

Formerly it was the custom, and it is still the custom in Massachusetts and some other states, for the reporter to state the facts upon which the judge rules and upon which the opinion is based. That, however, has been largely done away with in most of the states.

Formerly, as you know, the reporter had to come to court and with his pen write down what the judge said, and write down

what the counsel said; and sometimes you will find the old reports quite dramatic; you would sometimes think that the hero of the play was the counsel, but we all know, of course, that that was a sad mistake, because ultimately the judge comes down like the god out of the machine, and puts an end to the play.

That was all well enough in the old days. In those days it had to be done in that way, in order to make an intelligent report. The reporter had to state what the facts were in the case, what the counsel was talking about, and what the judge was talking about.

But that has all been done away with. The judges file their opinions in writing, and they state their own facts, except in a very few instances, when they rely upon the reporter. The trouble is that the judges, and the reporters too, state the facts too much at large, whereas we know that some of the old reports were deficient, in that they did not have any adequate statement of the facts.

The facts in a case are of the utmost importance to the understanding of a point; but, in stating the facts, it must be borne in mind that you must state only the material and the relevant facts. I have seen reports in which the judges have started out by saying that this is a bill in chancery by John Jones against John Smith to quiet title. The bill of complaint was as follows, setting it out at length. The defendant answered as follows, again at length and so it went all down through the record; and when it came to the real nub, there wasn't any relevancy in what the plaintiff had alleged as to the form of his allegation, or what the defendant had answered; but it was the easy way of getting up a report.

That is a very serious fault in a report. I have had experience of men who, in preparing cases for the reporter had to go to the records to get up statements of fact, because the judge's statement was deficient—and in order to be sure of his ground he lugged in a whole raft of irrelevancies, because he didn't know, he said, what the judge was driving at.

It is the fact that the statement of facts is one of the premises of the judge's conclusions in his opinion and it is of the utmost importance that the facts that he has in mind, to which his conclusion applies, be stated accurately, and not over-stated; because the more you put in the more the lawyer is puzzled and misled.

It has been urged upon me, as a reporter, that there are a great many opinions that are of no value as precedents, and that ought to be left out of the reports. The committee that studied this question under Mr. Reynolds' able direction, went into it quite fully. There were some discussions. I exchanged letters and discussions with various members of the committee. Some of them thought that the judges of the courts should mark what opinions should be published. Others thought that that was putting too dangerous a power in the hands of the court, and that a committee of the bar, somewhat similar to the committee that has the matter in charge in England, should be adopted.

Now, gentlemen, the committee, after carefully studying the question, came to the conclusion that this should not be done. You are to bear in mind that the opinions that are filed are public records. If the official reporter does not publish a certain opinion, because he thinks it is not material to the development of the law, or if I, in my high-mightiness, should say, "We wont publish that, that does not amount to anything," there is such a thing as the public press in this country, and such a thing as freedom of the press. We have had the experience that, when it was found that opinions were omitted from the official reports, newspapers and local law journals started up for the purpose of publishing these omitted opinions.

The State of Kentucky had a very severe experience in this regard. They had a statute that the judges should mark what opinions they regarded as of sufficient importance to justify publication, and those not so marked should not be published in the official reports. The judges went to it. As one of them expressed it, that was the easiest part of their job. Said he, "What I wrote ought to be published, and what the other fellow wrote didn't amount to so very much." A large number of opinions was omitted from the reports. Along came an astute Kentuckian, and started a local law journal, for the purpose of publishing these officially unreported opinions; and before they knew it, he had almost every member of the Kentucky Bar who was having any practice subscribing to his little publication, and the judges were citing it, and relying upon the decisions reported in it, and the official reports were going by the board. Practically, he had as many subscribers as the official reports had.

Then, about that time, along came the Southwestern Reporter, and included the Kentucky cases, and, of course, it is our business to publish everything that the judges file; that is the bedrock principle on which we are operating, and there was a merry fight between the local reporter and the Southwestern Reporter, and the official reports weren't anywhere. Finally, the Kentucky legislature woke up, and said every opinion must be published.

In Nebraska the same thing occurred. There was a period when a line of decisions by the Nebraska Supreme Court Commissioners was required by statute to be not published. That was when the Northwestern Reporter first started, and the judges got after the editor and after the publisher—we were not as wise then as we are now—and they said they were not going to publish them officially; "Why should you cumber yourself up with them?" We said we wouldn't. Well, we had a perfect hornet's nest around our ears. The judges got hold of those decisions, and some of the counsel got copies, and they would appear in court and spring a trap that would upset their opponents. Later the State Bar Association obtained legislation ordering that those opinions should be published officially, and there are now ten volumes of reports, called unreported decisions. Of course, the Northwestern Reporter had to include them to complete its reporting service.

There are certain fact cases that have always bothered me, as a reporter. Judges sometimes spend an undue amount of time in arguing or in determining the facts of the case and weight of the evidence. I am reminded here of a story that illustrates the reasons, especially out west, where we have the elective judiciary down to such a fine point.

There was a case in one of the western states a great many years ago, that was a terrible instance of arguing on facts. There were a few points of law in the case, but a large number of pages was devoted to arguing the facts, and the judge agreeing with the jury or disagreeing with it, whichever it was. I took it up with the judge, and I said: "This is a terribly long opinion." "Why do you think it is necessary to load up your opinion, and compel us to load up the report, with such a long discussion of the facts?" "Well," he said, "I will tell you. This was done so that, when those sons of guns of lawyers come in here to ride me, I have got

the record, I can refer them to it and know what I am talking about."

You see the difficulty; the judges of our courts are very much up against it. There are some things they can't do to discipline the Bar, because they are elective judges.

I sympathize, of course, with what has been said here by our learned friend from Canada, and by Lord Finlay, but I am not prepared to say that something cannot be said for an elective judiciary, although it has this great evil, that the Bar have a great deal too much influence with certain judges who have not got the moral backbone to stand out against practices like these I am calling your attention to, because they are afraid of some heavyweight counsel in the case. We know that this is the case.

But, by and large, it is to be said that the elective judiciary do pretty well under very trying circumstances.

I have given a good deal of advice here in the time that I have occupied, to judges and to courts; and it occurs to me that perhaps there is something to be said as to the duty of the reporter. As I said, we have to report the cases as they are filed of record. One of the fundamental principles that we are guided by is that we do not alter a jot or tittle in an opinion. If we think the law is bad, we simply shrug our shoulders and go along. We don't fight with it. And if we find wrong words used in an opinion, we don't alter them, but we take it up to the court, to find out whether the typewriter has made a mistake. We must report all the cases; but there is one thing that we determined upon when we first started, and that was that we would not set forth the briefs of counsel.

It is a fact, and it has been urged upon me a great many times, that it is very valuable, when a man has a similar case, to find out what the argument was, what was urged upon the court, and what did the court think of it? But as at present administered, it is the fact that the law as laid down in the opinion takes account of all that the counsel said that was pertinent. The citations, the cases that were cited, the judge mulls over them, and cites them sometimes at undue lengths in his opinion; and why should anyone repeat them in the argument and briefs of counsel? I am glad to say that our method in this respect has been practically, to a very great extent, adopted by the official reports. The

last account that I have of this shows that out of the 48 states of the Union, 33 do not have any abstracts or briefs of counsel. Fifteen have. The Supreme Court of the United States, under the able editorship of Ernest Knaebel, very seldom has any argument or briefs of counsel. It takes up too much space in reports that are already voluminous.

We must, however, report all cases, as I said before; and it may be well in this connection to refer to the interesting history of England in this regard.

Some judges and lawyers seem to have the opinion that if we could select some power—somebody with omniscience, somebody that knows everything, that can take into account all the conditions, look before and after—this imaginary person or power could select such of the opinions as are essential to mark the progress of the law and the development that goes with such progress. No less an authority than the Lord Chief Justice of England delivered an address a year or two ago when he was on a visit to this country in which he took the ground that in England they had a system by which they selected such cases as were thought essential to be published, and that they never thought of publishing others. I suppose his Lordship had in mind the system by which the committee on law reporting called the Incorporated Council of Law Reporting for England and Wales, "selects the cases and publishes the reports." Some American judges and lawyers, knowing that this system prevails in England, have wondered why it couldn't be adopted in this country, and do away with some of the opinions that, from one point of view or another, somebody doesn't deem it necessary should be published. What happens in England under the method that I have referred to above, of having the Incorporated Council of Law Reporting, consisting of solicitors and barristers of all the Bar, who are supposed to have the wisdom and discretion to select the only cases that the bar needs and the only ones to be published—what happens in this very instance? The cases selected by the Incorporated Council of Law Reporting are published in what is known as the Law Reports. Notwithstanding this, it has resulted that there are now four series of English general law reports, which cover the same courts and report to a very considerable extent the same cases, and select others that the other series do not report. The different series are as follows:

1. The Law Reports. This series is published under the superintendence and control of the Incorporated Council of Law Reporting for England and Wales, and contains cases to be selected by the Council to be reported.
2. Law Journals Reports. All courts. This series covers the same ground as the "Law Reports." Published in monthly advance parts, which are later combined into bound volumes. Publisher, The Law Journal Reports, 119 Chancery Lane, London.
3. Law Times Reports. Covers the same ground covered by the "Law Reports," and in addition the Court of Criminal Appeals and the Railway and Canal Commission Court. Published by Field and Queen (Horace Cox) Ltd., "Law Times" Office, Windsor House, Beam's Bldg., E. C. Two volumes a year.
4. Times Law Reports. All courts. Published by John Bland, at the Times Office, Printing House Square, London. One volume a year.

And apparently all these have to be bought by the lawyers so as to play safe. I suppose some of the members of the Bar buy all of them for fear they should fall into a trap.

I have occupied a great deal of time, and I thank you very much for the attention which you have given me. The judges of this country, of these 48 states and the super state of the United States, occupy a peculiarly dignified and exalted position.

What is it that makes the American and English system of the law unique—popular? Why is it that the judges in the United States and England, in spite of what some radical and half-baked thinkers may say to the contrary, stand higher in the estimation of the people than any other body of men? I will tell you why. It is because they carry on their work in the light of day; it is because every step they take they take in the light of reason, as presented in their utterances filed of record in the archives of the court and published abroad for all men to read. Do you ask whether the publication of these opinions, good, bad and indifferent, tends to raise the standard of judicial estimation in the minds of the people? I say so, with full knowledge of what I am talking about; and I don't mean by this, either, that everybody reads law reports; we know that law reports are dry and hard reading; but they are capable of being read by men of understanding, and they are so read, and are published and expounded every day in the newspapers, from the

stump, in the courts, to the juries, so that people understand and know what you gentlemen of the bench are doing. You are subjected in every truth to pitiless publicity. None of your utterances can be put away in the guise of a secret treaty, to be sprung upon an unsuspecting litigant by some astute lawyer who wishes to take advantage of the situation. Time was when this could be done, but it is no longer, and it is well that it is not so. This, I say, is what gives you gentlemen of the bench your unique and justly exalted position in the public life of the country.

REMARKS

OF

ELIHU ROOT,

OF NEW YORK.

While more than 50 years have passed since I became a member of the Bar, I still take an interest in the judiciary. There are some very interesting things that I observe in the development of our law, and the administration of it, and public opinion in regard to it.

In the first place, you have a double function under our system. You are to apply in concrete cases for concrete heads, the laws which are enacted by the national and state legislatures. In that way, you are an arm of the legislative branch. You are necessary for its effectiveness. The laws which the legislative body passes will be ineffective unless you apply them.

But, on the other hand, you are the natural enemies of the legislature. The whole course of constitutional development in this country has been to pile up, one after another, a continually increasing set of limitations upon the actions of legislative bodies, prohibiting them from doing this and doing that and doing the other, and requiring them to do this and that and the other thing, under certain restrictions and safeguards against unconsidered action or action under what Mr. Conkling used to call forbidden and abhorrent forces.

Now, those limitations which the people of the different states have imposed upon their legislatures, because they don't trust the legislatures, because they find so much human weakness on the part of the legislators, amount to nothing unless you enforce them against the legislatures.

That has been ground into us since John Marshall's time; and, with the exception of here and there a crank, some fellow who simply knows it all, we assent to it.

At the same time, the legislatures are continually tying you up in threads, cords, ropes and chains of legislation about procedure. I have been for a good many years now sputtering about it, coming as near swearing about it as one well could in a parliamentary way, and declaring, as I now again declare, that one

great trouble about the administration of law in the United States is that our legislative bodies will not permit the judges to do justice.

There is this peculiarity about all these practice and procedure statutes: When a man has a lawsuit, and he thinks, either as plaintiff or as defendant, that it is necessary to have certain interlocutory relief, if he thinks it is right there should be an injunction, or an attachment, or a receiver, or the examination of a party, or a commission or an order to take testimony of some other witness, if he is at liberty to go to the judge and appeal to the judge's sense of what is fair to do, in order to get at the merits of that case, he will get it; and if the judges have established rules regarding the way in which he should act, nevertheless those rules do not give any right against what the judges consider to be fair and just. But if the legislature has made a series of provisions, each provision constitutes a legal right, and you cannot discriminate. The law is that a man shall have such and such a thing done in a particular way, according to the relief he wants. The law is that a man shall not have the interlocutory relief that he wants unless he goes in that particular way, and there is a legal requirement there that you have got to observe. So you have thrust into the litigations that come before you, a long series of separate independent, preliminary legal rights, and you have litigations about this legal right and that legal right and the other legal right, before the court ever gets to a point where the legal right on which the parties came into court can be tried.

Now, those things come up, not because legislatures are malicious, but because, as a rule, a large part of the members of the Bar who go into the legislature go in when quite young, or are men with not very much practice. They have had experience in a few cases, and when something has worked wrong in a particular case with them, when they think that a particular case has not been treated as it should have been, they go in and get a statute passed which applies to all cases, for the purpose of remedying what that particular legislator conceives to be a wrong. And another man does the same thing, and another the same thing, and the next year some other fellow will come in with his vision and will get the law amended, and so it goes. The result is

that, instead of having the breadth of view which a general experience with the trials and decisions of courts gives to the just judge, to determine how causes should be brought into the condition of hearing and determination, you get an infinite variety of special views, based on the limited experience of the young men who go into the state legislatures.

And I think a very large part of the trouble that Mr. Randall has been talking about in the reports comes from the fact that you have got a swarm of separate legal rights to deal with instead of being allowed to do justice in the case as it comes before you, to enable the parties to get at the merits of the case, and get it settled.

I do not believe in half-way measures about this. I would wipe out the whole business. I think you can put the rules of practice which are really necessary to impose upon the judges to prevent their going wrong, on two sheets of paper, and then wipe the whole burdensome mass of code provisions out, and with that little series of fundamental rules leave it to the judges to do justice.

The Bench has been hammered so, there has been so much abuse of the courts, there have been such loud outcries against the courts, that I think a good many judges are getting rather sensitive, and I do not think there is quite that sturdy independence in applying the Constitution that there was 30 or 40 years ago.

Now, let me say this about it. Of course, every defeated litigant goes down to the tavern or, since prohibition, elsewhere, to swear at the courts. Of late years, the defeated litigants have got a hearing from the public that they did not have formerly. Sometimes they are great organizations; sometimes they have political power behind them; sometimes they are complaining at a decision which frustrates public feeling; and the defeated litigant has made more noise and got more hearing within the last 15 years, ten times over, than he could get 30 years ago.

The real secret of it, the real reason for it, is not that the people of our country have lost their faith in the courts, not that they have lost their confidence in the judges, but that they are becoming less and less willing to be bound by law. We are going through a phase—temporary, God grant, and I believe He will

grant it—a phase of public feeling, in which men are more restive under the restraint of law than they used to be. They resent having the impulse of the moment, or the desire of the moment, frustrated by prescribed rules of conduct. And they flout the judges and the courts, and complain in the press, because they are unwilling to submit to the restraint of law.

You are in a position where you have got to meet that, because you have got to enforce the law, and this feeling will pass away. The change of the law, the development of institutions, always has to move along a little behind the courts. Courts do not hang back. It is the development that hangs back. The courts have to apply the law as it is. God forbid that we should ever have a judiciary which abandons the law as it is, and undertakes to apply the law as it thinks it ought to be, for when you get that, you have a government not of law but of men, and you will no longer be courts; there will no longer be courts if you do that. Legislatures can do that, and executive officers can do that. As long as you are courts, you have got to apply the law as it is; and the people who think the law ought to be changed will, for a time, find fault with the courts because they do not change it. After a time, people, through the due and orderly methods of constitutional governments, make the change, and then the courts enforce the law as it has become. And then, presently, will come another public desire, and the same thing will go on again; and that condition of restiveness with the courts, because the people have not made the necessary changes to meet the changes of the conditions of life and business, will be always most aggravated in times of change.

We are just now at a time when everything is changing. For the last 15 or 20 years changes have been in the air and in the desires of people; and the change of conditions in business, occasioned by the great new wealth of the world, and the enormous enlargement of the productive powers of mankind, and the change of relations between capital and labor and employers and employees, and producers and consumers, caused by these great new opportunities and new facilities, all these changes of conditions fill the minds of people properly and rightly with a desire for development. We have got to develop, and after a time that phase will be passed, and people will recognize that the only thing

that kept the whole establishment from blowing up, going to pieces instead of developing, was the judicial branch of our government, which always, step by step, enforced the law as it was at the time. Believe me, as an observer of the trend of the public mind of the people of the United States, underneath all the noise and newspaper talk and heroics in public meetings, underneath all that there is, among the American people, loyalty to their institutions, and confidence in the just and honorable men who are maintaining those institutions upon the bench.

IX.

THE LEGAL PROFESSION AND THE WAR.

The War Resolutions of the American Bar Association and in Which it Spoke for the Profession.

At the 1917 annual meeting of the Association Elihu Root, on September 4, offered the following resolutions, *which were unanimously adopted* (42 A. B. A. Reps., 25-26):

"The American Bar Association declares its absolute and unqualified loyalty to the government of the United States.

"We are convinced that the future freedom and security of our country depend upon the defeat of German military power in the present war.

"We urge the most vigorous possible prosecution of the war with all the strength of men and materials and money which the country can supply.

"We stand for the speedy dispatch of the American Army, however raised, to the battle front in Europe, where the armed enemies of our country can be found and fought and where our own territory can be best defended.

"We condemn all attempts in Congress and out of it to hinder and embarrass the government of the United States in carrying on the war with vigor and effectiveness.

"Under whatever cover of pacificism or technicality such attempts are made, we deem them to be in spirit pro-German and in effect giving aid and comfort to the enemy.

"We declare the foregoing to be overwhelmingly the sentiment of the American Bar."

The Profession's War Committee.

Two days later, on September 6, 1917, by George W. Wickersham, of New York, moved the creation of our War Committee, declaring (42 A. B. A. Reps., 105-6):

"As a sequence to the resolution adopted at the opening of this annual meeting, and in order to put into practical application those principles so enunciated, I offer the following resolution:

"*Resolved*, That a War Committee of this Association is hereby constituted, to consist of the Honorable Elihu Root and four other members of the Association, to be appointed by the President of the Association, which committee shall consider and take such action as may be appropriate concerning matters from

time to time arising by reason of the war and in which the Association may be of service to the general welfare."

The resolution was variously seconded, was unanimously adopted, and the War Committee created by the resolution was constituted with the following personnel, which includes three former Secretaries of War (42 A. B. A. Reps., 192):

ELIHU ROOT, New York, *Chairman.*
WILLIAM H. TAFT, Connecticut.
JACOB M. DICKINSON, Tennessee.
FREDERICK W. LEHMANN, Missouri.
GEORGE SUTHERLAND, Utah.

This War Committee was continued for the year 1918-19 (see 43 A. B. A. Reps., 204).

THE LEADERSHIP OF LAWYERS IN THE WAR.

In this connection another member of the Association asserted at this 1917 Meeting (42 A. B. A. Reps., 106):

"The inspiring resolution adopted a moment ago creating a War Committee indicates the quickened sense of responsibility of this Association with respect to our profession's relationship to a successful conduct of the war and it should emphasize to us the necessity as a war-measure for speedily upbuilding the membership of our great organization so that it may contain every lawyer who ought to be in it, and be in fact as well as in name the associated Bar of America.

"Members of our profession are dominating this war. President Wilson and Secretary of State Lansing are lawyers, as are Secretary of War Baker and Secretary of the Navy Daniels, even General Crowder, who as Provost Marshal General is building our new armies, and General Pershing, the commander-in-chief of all our over-seas troops, also Secretary of the Treasury McAdoo, who is raising the billions necessary to prosecute the war."

Since then two years have passed. Events stand out sharp and clear. Who dominated the war—controlled it—made possible the winning of it? We speak here only of the chief executives. Do you realize the answer? LAWYERS! And what a proud record it is for our profession in America! *The proof?* It is here in words recently uttered which we quote as follows:

(*a*) The Commander-in-Chief of the Army and Navy, President Wilson—lawyer, and the man who from first to last dominated the world in the making of peace;

(*b*) The civilian head of the army, Secretary of War Baker—lawyer;
(*c*) The civilian head of the navy, Secretary of the Navy Daniels—lawyer;
(*d*) The actual builder of the army, Provost Marshal, Major-General Crowder—lawyer;
(*e*) America's military commander-in-chief at the war front, General Pershing—lawyer (member of the Nebraska Bar);
(*f*) The indicator of legal methods—Attorney-General Gregory, lawyer of course;
(*g*) The chief of the State Department, Secretary of State Robert Lansing—lawyer;
(*h*) The raiser of the billions of dollars necessary to fight the war, Secretary of the Treasury McAdoo—lawyer;
(*i*) The director-general of all the railroads, first, Secretary McAdoo—lawyer, and *now,* Director-General Walker D. Hines—lawyer also;
(*j*) The chief executive of the shipping board, with its nearly five billions of new tonnage, Chairman John Barton Payne—lawyer, and who was general counsel for the Railroad Administration throughout the war;
(*k*) The man who seized and held the hundreds of millions of dollars' worth of alien property, Alien Property Custodian Palmer—lawyer, and now the Attorney-General of the United States.
(*l*) More may readily be mentioned—all lawyers. Could the draft by any possibility have been made the instantaneous success it was without the Legal Advisory Boards?

Although the lawyers of America have always controlled the making and execution of our laws, it is clear they are also now filling the most important executive positions in the nation. There is an indefinable something about the way lawyers—*real* lawyers—*do things* (no doubt the result of their training in law and the rigid system of analysis and reasoning required), that seems to make them indispensable, notwithstanding their shortcomings, when matters of vital concern *must* be done.

The Draft of America's Man Power—The Bar's Response to the Call of Duty.

In August, 1918, General E. H. Crowder, the judge-advocate general of the army and also the provost-marshal general, and as such the builder of our great armies, wrote expressing his gratification that he belonged—

"To an association [the American Bar Association] which mobilized the legal profession of the United States so thoroughly that the assistance which the lawyers of the country brought to the administration of the Selective Service Law and Regulations stands out as achievement beyond praise."

Continuing, General Crowder, than whom no one in America is better qualified to express an opinion upon the subject, asserted:

"On the eighth of last November [1917] the President of the United States, in his foreword to the Selective Service Regulations, called upon men of the legal profession to offer themselves as members of the Legal Advisory Boards for the purpose of advising registrants of their rights and obligations and assisting them in the preparation of their answers to the questionnaire.

"Five days later I addressed to the Vice-Presidents and members of the General Council of the American Bar Association, including the officers of the State Bar Associations, letters outlining plans for the organization and effective operation of Legal Advisory Boards. So expeditiously did the officers of the American Bar Association organize a central committee in each state, and select and organize the Legal Advisory Boards attached to each local board, and so spontaneously did the members of the legal profession throughout the whole country respond to the call of duty, that, one week later, and nearly a month in advance of the time when the Legal Advisory Boards would be required to begin their actual labors, I was able to write to the Secretary of the American Bar Association as follows:

"In fact, the members of the profession generally, after the President's call was published and before they learned of the definite plans of organization, were so impatient to respond to the call that meetings of lawyers, for preliminary organization, were held throughout the length and breadth of the land, such meetings being attended by hundreds and sometimes thousands.

"A large volume would not suffice to record the names of the lawyers of the country and a bare summary of their labor and achievements. A brief citation of the figures **of one state alone**, and this was not the largest, shows that there were organized within two weeks 850 permanent members and 3000 associate members of the Legal Advisory Boards; that, during the months of December (1917) and January (1918), these boards held more than 4000 meetings and devoted more than three million hours to aiding and advising more than 400,000 registrants. In the greatest city of the nation, where half a million registrants were required to respond to the questionnaire, the permanent and associate members exceeded three thousand in number.

"When it is borne in mind that 100,000 lawyers, serving in the capacity of members of the Legal Advisory Boards, Government Appeal Agents, and permanent and associate members of Legal Advisory Boards, took part in aiding, advising and classifying more than nine million registrants within the brief period allotted, it immediately becomes evident how impossible it is to comprehend the grand total of the accomplishment. It is equally apparent how futile would be the effort to express adequate appreciation of such labor and achievement."

ORGANIZATION OF THE BAR ESSENTIAL FOR EFFECTIVE SERVICE.

The necessity for associated effort by the Bar in order to render effective service to our country has been forcefully stated and convincingly demonstrated, as also the Bar's duty, by former Secretary of State Root, when he penned these potent words of wisdom and of solemn warning (italics ours):

"It is plain that the whole world has entered upon a period of re-examination and development of political and juridical systems. Nowhere is this period of development more critical than in the United States.

"In this juncture *the highest duty of service to the country rests upon the Bar.* Their knowledge, their training, their fitness to lead opinion, should be utilized to the utmost. *This duty cannot be effectively performed by lawyers acting singly each for himself.* It must be by association. In modern times *it is only by the power of association* that the men of any calling exercise their due influence in the community.

"For the performance of this duty a great agency already exists in the American Bar Association. . . . . Its organization runs into every state. Its members are of every section, of every political party, of every racial inheritance. There are many excellent state and local bar associations, but *the new questions are national, not local.*

"*It is the American Bar which is called upon to think and to form and lead opinion nationally and not locally.* Will you not urge upon your associates at the Bar who are not already members this view of their opportunity and duty and bring them into this great Association for the public benefit."

In somewhat similar language former President Taft, recently addressing the Maine State Bar Association, declared (20 Me. B. A. Reps., 93):

"I would like to supplement what has been said with reference to the wisdom and help of the increase of membership in the American Bar Association from the Bar of Maine. It is time that

we stood together. We have a great profession; we have a great cause to promote—the administration of justice. . . . . We are peculiarly adapted to association. . . . . I hope you will come into the American Bar Association. It is a great Association. It really has a great influence."

So also Simeon E. Baldwin, former Chief Justice of Connecticut, and recently its Governor, asserted:

"The American Bar Association seems to me to present great attractions to any members of the Bar who have a desire to advance the standards of our profession or to improve our methods of judicial procedure.

"It has an unquestionable and unquestioned position as the only body representing the American Bar as a whole. . . . .

"*We want no additions to our membership except those who sympathize with our work and are ready to do their part toward supporting it as they have opportunity.*"

Opportunities for War Service Opened to Individual Lawyers.

As an aid to the federal government and to lawyers patriotically desiring to serve to the best of their abilities in such governmental positions as were open to lawyers during the war emergency, a special committee of one was created early in 1918 (popularly known as the Association's Special Committee for War Service) consisting of John Lowell, of Massachusetts, with headquarters in Washington, D. C. The chief aim of this committee was to perform a *liaison* service between individual lawyers and the departments and bureaus of the United States Government in need of personnel possessed of legal abilities. Its services were freely at the disposal of any lawyer, whether a member of the Association or not, through Mr. Lowell, its chairman, and Lawrence G. Brooks, its secretary, at the committee's headquarters in Washington, and its activities have been outlined in its reports in the issues of the American Bar Association Journal.

Our Members in War Service Exempted from Dues.

The American Bar Association commencing in 1917, as a slight token of appreciation, exempted from payment of dues during the continuance of the war all its members who had joined or should join the colors by serving in either the army or navy.

DUTIES OF THE PROFESSION RESULTING FROM THE WAR.

These were outlined by Elihu Root, Chairman of our War Committee, at the Annual Meeting in Cleveland (1918). *Inter alia,* he said:

"Never since those days when upon a barren shore little bands of white men took up their warfare against a savage foe have such portentous events happened for America as have occurred since we met only last year at Saratoga (1917). And we have proved, we are proving today, that the idea of individual freedom, the habit of calling no man a superior, the sense unconscious in men of equal sovereignty, in man and woman and boy, carries with it a development of power. . . . .

"Now all this is the lawyer's business. All this is a matter which directly concerns and appeals to us, for it is the basis of the theory of government, the fundamental basis of the law that we are asserting which is working out the development of those theories of freedom. . . . .

"The Bar has answered to the demands which these amazing issues present. It was a fortunate circumstance that the President placed in the hands of the head of the Law Department of the army the application of the law for conscription and for the raising of the vast army already in France, and the still greater army which is about to follow; for, in the first place, the judge-advocate general, General Crowder, when he became provost-marshal general, applied the new law under the war power of the Constitution to the people of the country with a just sense of their legal rights and the legal principles to which they were accustomed. I do not want to pass his name without expressing a sense of satisfaction and doing honor to that admirable and able and effective officer, General Crowder" (applause). . . . .

THE LAWYER'S DUTY IN THE PREMISES.

It is with a grim and almost holy pride that every lawyer may view his work who has answered his nation's call to duty in our war emergency, whether by service on the firing line, courageously facing death or at great personal sacrifice performing other service, not so courageous, but none the less essential for victory, as in helping to raise and equip the army and navy, upholding the hands of the government, aiding in securing the funds for the carrying on of the war, and in furthering with might and main the great work of reconstruction the world over, which is now the dominant, all-important issue, the world wreckers having been driven to defeat, and victory completely achieved.

And all other lawyers whose duties did not permit direct participation may still thrill with solemn pride when they view the achievements and the record of their profession, *qua* profession, in this war, remembering, as we all should, and never forgetting it, that out of a hundred millions of people we lawyers are a little band of less than 140,000 all told—that is, less than 1 per cent of the American people, *actually less than 16/100ths of 1 per cent.* And it is from this small group, to whom our nation, and perhaps the whole world, looks for leadership in law, at least, which in actual practice is the application to the affairs of mankind of the great principles of eternal justice—"the great interest of man on earth."

THE AMERICAN BAR ASSOCIATION.

Can any American lawyer anywhere, who contemplates the facts just narrated, and who loves his profession and above that loves his country and his fellow-man, fail to realize it as a supreme duty to associate himself, if eligible, with our little group of ten or eleven thousand lawyers, who are standing together shoulder to shoulder as the American Bar Association, endeavoring by associated effort to achieve the ideals declared by its constitution, and which during its 41 years of effort have been gradually achieved, to wit:

"To advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law and encourage cordial intercourse among the members of the American Bar."

To put this as a question is to answer it. And in the last analysis it is patent there is not a lawyer worthy of membership in the American Bar Association, indeed who is worthy of membership in our great profession, who does not neglect a plain duty if he fails to associate his efforts with those of his brethren North, East, West, South, in our endeavor to realize for mankind the centuries old ideals of our profession, and which can never be completely attained without actively organized associated effort.

And should not we, who are members of the A. B. A., each perform the clear duty of bringing this truth home to as many of our profession as possible? *If you believe this, press it today*

upon some professional brother, and tomorrow upon another, and so on and on until we have every lawyer in our Association who ought to be in it. Thus only may it fulfill its mission.

MEMBERSHIP IN THE AMERICAN BAR ASSOCIATION—HOW SECURED.

Any lawyer, whether on the Bench or at the Bar, of three years' good professional standing, is eligible to election to membership. Whoever desires to become a member of the American Bar Association, and thereby identify himself with his profession's great national organization and thus aid in furthering its work, should forward his name and address to the Association's Vice-President for his state and advise him of the year and place of his admission to the Bar and of such other facts as may seem to him to be relevant. The names and addresses of the Vice-Presidents are now always printed in the Association's Year Book, and also in each issue of the Association's JOURNAL on the last page next to the cover. There is no initiation fee, and the dues, $6 per annum, include subscription to both the JOURNAL and the Year Book.

LUCIEN HUGH ALEXANDER,
Chairman Membership Committee.

Philadelphia.

X.

INDEX.